Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

AFFILIATED FM INSURANCE CO.,

Petitioner,

v.

CHEMICAL BANK, EUROPEAN AMERICAN BANK, BANQUE PARIBAS, AMERICAN EXPRESS BANK LTD., NATWEST BANK N.A., RABOBANK NEDERLAND, ANDINA COFFEE INC., and ANDINA TRADING CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

On appeal from an adverse federal district court judgment of nearly $92 million, petitioner Affiliated FM Insurance Co. raised eight substantial and meritorious issues, each of which provided a complete or partial defense. Concluding that agreements made in December 1985 and April 1986 cancelled all coverage under Affiliated's marine cargo insurance policy, the Court of Appeals reversed the district court's judgment and directed dismissal of the case. That decision obviated the necessity to adjudicate Affiliated's other issues, which were now moot. However, on rehearing, when the Court of Appeals reversed itself on the enforceability of the April agreement and reinstated over $50 million of the district court's award, it omitted to reach and decide any of the seven issues which its original decision had left undecided, but which were no longer moot and now required adjudication. And when it denied Affiliated's own subsequent petition for rehearing, the Court of Appeals again omitted any reference to the seven still undecided issues. The questions presented are:

1. Whether the Court of Appeals violated petitioner's right to appeal, accepted federal appellate procedure, due process, and fundamental fairness when it allowed substantial issues to remain unaddressed and undecided simply because it initially focused on a single, apparently controlling issue, then allowed those other issues to fall between the cracks and remain undecided when, on rehearing, it reversed itself on the single issue which had preoccupied it?

2. Whether the Court of Appeals' failure to adjudicate substantial issues after partially reversing, on rehearing, its original decision which had temporarily rendered those issues moot, conflicts with decisions of this Court and of other circuits, including the Eleventh and Federal Circuits, dealing with this recurrent procedural problem?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding appear on the cover, and therefore need not be separately listed here, except that respondent Chemical Bank is now known as The Chase Manhattan Bank, respondent NatWest Bank, N.A., is now known as Fleet Bank, N.A., respondent Banque Paribas is now known as BNP Paribas, and the full name of respondent Rabobank Nederland is Cooperative Centrale Raiffeisen-Boerleenbank B.A.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner Affiliated FM Insurance Co., a nongovernmental corporation, states that its parent company is Factory Mutual Insurance Company, and that no publicly held company owns 10 percent or more of its stock, or of its parent company's stock.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	vi
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
A. The underlying facts	2
B. The district court litigation	5
C. The Court of Appeals' decisions	6
Reasons for Granting the Writ	10

Contents

Page

A. The court's failure to address substantial and potentially dispositive issues left undecided as a result of its focus on another single issue departs from the accepted and usual course of federal appellate practice 11

1. The court never characterized the undecided issues as being "without merit" 12

2. None of the undecided issues could fairly be characterized as "without merit" 12

a. The future-dated draw document issue, which the court left undecided 13

b. The federal maritime jurisdiction issue, which the court left undecided 14

3. The court below recognizes the sharp distinction between rejecting an argument, even with a simple "without merit" tag, and remaining silent as to its merits 15

Contents

Page

4. The court's failure to address and decide the undecided issues not only represents a grave departure from accepted federal appellate practice, but critically impaired Affiliated's right to appeal under Section 1291, procedural due process, and fundamental fairness 17

B. The court's failure to address substantial and potentially dispositive issues left undecided as a result of its exclusive focus on another single issue conflicts with decisions of this Court and of other Circuits, including the Eleventh and Federal Circuits 20

1. The conflict with this Court's teaching 20

2. The conflict with decisions of other courts of appeals 21

Conclusion 22

TABLE OF CITED AUTHORITIES

Page

Cases:

Andina Coffee, Inc. v. National West. Bank, et al., 160 A.D.2d 104, 560 N.Y.S.2d 1 (1st Dept. 1990), *appeal granted*, 167 A.D.2d 991, 562 N.Y.S.2d 933 (1st Dept. 1990), *appeal withdrawn*, 77 N.Y.2d 957 (1991) 14

Atlantic Mut. Ins. Co. v. Balfour MacLaine Int'l Ltd., 968 F.2d 196 (2d Cir. 1992) 15

Benton v. Maryland, 395 U.S. 784 (1969) 20

Chemical Bank v. Affiliated FM Ins. Co., 1994 U.S. Dist LEXIS 721, 1994 WL 31413 (S.D.N.Y. Jan. 25, 1994) 7

Cobbledick v. United States, 309 U.S. 323 (1940) ... 18

Colorado River Water Conser. Dist. v. United States, 424 U.S. 800 (1976) 17

Exxon Chem. Patents, Inc. v. Lubrizol Corp., 137 F.3d 1475 (Fed. Cir. 1998) 16

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 18

Gelb v. Royal Globe Ins. Co., 798 F.2d 38 (2d Cir. 1986) 16

Cited Authorities

	Page
Hicks v. Quaker Oats Co., 662 F.2d 1158 (5th Cir. 1981)	16
In re Balfour MacLaine Int'l Ltd., 85 F.3d 68 (2d Cir. 1996)	15
Luckey v. Miller, 929 F.2d 618 (11th Cir. 1991)	16
Moran Towing & Trans. Co. v. Navigazione Liberia Triestina, 92 F.2d 37 (2d Cir. 1937)	16
N.L.R.B. v. Deena Artware, Inc., 361 U.S. 398 (1960)	21
Sirius Ins. Co. Ltd. v. Collins, 16 F.3d 34 (2d Cir. 1994)	15
Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985)	21
United States v. Minicone, 994 F.2d 86 (2d Cir. 1993)	16
United States v. United Continental Tuna Corp., 425 U.S. 164 (1976)	21
United States v. Wilson, 420 U.S. 332 (1975)	21
W.L. Gore & Associates, Inc. v. Intern Medical Prosthetics Research, 975 F.2d 858 (Fed. Cir. 1992)	22
Wood v. Strickland, 420 U.S. 308 (1975)	21

Cited Authorities

Page

United States Constitution:

Fifth Amendment 2

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 .....2, 17, 20, 22

28 U.S.C. § 1332(a)(2) 5

28 U.S.C. § 1333(a) 5

NYUCC Section 1-201(6) 13

Rule:

United States Supreme Court Rule 13.3 10

Other Authority:

Uniform Customs & Practices for Documentary Credits Article 47(b)(1) 13

Uniform Customs & Practices for Documentary Credits Article 50(b) 13

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided November 8, 1999 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided February 25, 1999 ..... 8a

Appendix C — Findings Of Fact And Conclusions Of Law Of The United States District Court For The Southern District Of New York Dated And Filed July 18, 1997 ..... 29a

Appendix D — Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Dated And Filed July 24, 2000 ..... 98a

Affiliated FM Insurance Co. ("Affiliated") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The initial opinion of the Court of Appeals reversing the decision of the district court and ordering judgment in favor of Affiliated (App., *infra*, 8a) is reported at 169 F.3d 121 (2d Cir. 1999). The Court of Appeals' opinion granting rehearing and reinstating a portion of the district court's award to respondents (App., *infra*, 1a) is reported at 196 F.3d 373 (2d Cir. 1999). The Court of Appeals' summary order denying Affiliated's petition for rehearing (App., *infra*, 98a) is not reported. The district court's opinion awarding judgment of $91.9 million to respondents (App., *infra*, 29a) is reported at 970 F. Supp. 306 (S.D.N.Y. 1997).

STATEMENT OF JURISDICTION

The original judgment of the Court of Appeals was entered on February 25, 1999. The Court's decision granting rehearing and modifying its original decision was entered on November 8, 1999. The Court's order denying Affiliated's timely petition for rehearing was entered on July 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291 provides, in relevant part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

The Fifth Amendment to the Constitution of the United States provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. The underlying facts:

The group of companies owned by Colombia's Echeverri family (the "Group") was, collectively, one of the two largest private exporters of Colombian coffee. The Group included respondent Andina Coffee, the group's wholly-owned New York importer and sales agent. Over the years, the Group trucked nearly 14 million bags of coffee to a Colombian port, whence the coffee was shipped by sea to New York, where Andina arranged for customs clearance, delivery to customers, and collected payment. This vast stream of maritime commerce was financed by letters of credit opened by Andina with the respondent banks. Upon presentation of a truck bill of lading and other draw documents, the Group would draw upon a letter of credit, at which point Andina was charged with a demand loan against its bank line of credit. Andina paid the loan when the coffee was received and sold in New York.

Since 1982, as required by Andina's loan obligations to the banks, these coffee shipments were covered by marine open cargo insurance purchased on behalf of Andina and the banks from Affiliated by Trinder & Norwood ("T&N"), Andina's longtime general insurance broker. Included in Affiliated's policy was a clause covering "loss or damage occasioned through the acceptance . . . of fraudulent Bills of Lading" — the so-called "FBOL" clause. Clauses 9 and 10 expressly limited Affiliated's liability for losses "at any one place and any one time" to $8 million, and capped any "accumulation of interests" at $16 million.

In 1985, Affiliated advised T&N of its intention to cancel its coverage, and on November 27 gave written notice to T&N. At the entreaty of T&N, which feared that unilateral cancellation would make it difficult to obtain replacement insurance for Andina and the banks, Affiliated agreed in early December to rescind its cancellation notice, in return for T&N's promise to cancel Affiliated's policy as soon as replacement coverage became effective. On February 25, 1986, T&N did obtain replacement coverage from certain London insurers through their London broker, effective on that date. T&N immediately informed Affiliated and Andina, and the latter notified the banks "almost immediately." On March 11, Affiliated formally confirmed to the banks the February 25 cancellation. None objected either to Affiliated's replacement by the London insurers, or to the lack of prior written notice.

In mid-April, Andina requested clarification from T&N concerning allocation of declarations and premiums between Affiliated and the London insurers on the basis of shipping dates. T&N solved Andina's problem on April 21 by negotiating a trilateral oral agreement — first with Affiliated,

then with the broker representing the London insurers. Their broker agreed that the London insurers would assume all risk relating to interior shipments as to which ocean bills of lading had not issued before February 25 — in exchange for all the premiums thereon. Affiliated agreed to cede all premiums on such interior shipments — in exchange for being relieved of all the risk thereon. With Affiliated entirely out of the picture, Andina's allocation problems were solved.

By the beginning of 1986, the ordinary time period from presentation to the banks of purported "truck bills of lading" issued by the Group's own trucking company until payment of the loans had inexplicably more than doubled. By early summer, it had more than tripled. Moreover, nearly all these "truck bills" were *future dated* — that is, on their face, they were dated in Colombia *on or after* the date they were presented to the banks in New York. In consequence, they could not signify either that the exporter had ever relinquished control of the coffee to the trucker, or that interior truck shipment had ever actually commenced. Finally, Andina sought an additional 60 days to repay loans incurred when the banks paid on these facially deficient "truck bills," which they continued to do despite these warnings.

In August 1986, the Group finally admitted that over 200,000 bags of coffee covered by these facially deficient "truck bills" did not exist. When Andina, even with the Group's assistance, was unable to meet its outstanding loans, the banks for the first time declared those demand loans in default. Andina almost immediately collusively "sued" its fellow respondents NatWest and Rabobank in New York state court to block further reimbursement to Colombian correspondent banks on the "truck bills." Andina and the

banks presented expert and other evidence showing that future-dated "truck bills" like these raised inescapable red flags, could not evidence that the coffee existed, and were not "bills of lading" under the Uniform Customs & Practices for Documentary Credits ("UCP"), New York's Commercial Code, or the banks's own letters of credit. Contrary to the position they took later against Affiliated, Andina and the banks represented that, absent signification that the exporter had relinquished control or that shipment had commenced, such papers were not, and could not be, legitimate bills of lading.

B. The district court litigation:

In 1987, Andina and the banks sued Affiliated, the London insurers and their broker[1] in the Southern District of New York, claiming that the marine open cargo insurance policies covered the losses which resulted when the banks allowed Andina's Colombian affiliates to convert the future-dated draw documents into cash. Their complaints asserted federal diversity jurisdiction under 28 U.S.C. § 1332(a)(2), and federal maritime jurisdiction under § 1333(a). Factual investigation, discovery, and motion practice consumed the next several years.

Senior District Judge Milton Pollack, after a bench trial in 1997, ruled that T&N lacked authority to bind the banks to the December or April agreements without their express consent — rejecting apparent authority, ratification, and all the other defenses advanced by Affiliated. He declined to

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1. Prior to trial, the bank plaintiffs settled their claims for both pre- and post-February 25 "shipments" with the London insurers and the brokers.

enforce the December and April agreements, interpreted away the policy's $8 million limitation-of-liability clause and its $16 million cap on accumulation-of-interests, rejected federal maritime jurisdiction, and awarded judgment which, with prejudgment interest calculated at the New York state rate of 9 percent, approximated $92 million.

C. The Court of Appeals' decisions:

Affiliated's appeal to the Second Circuit raised eight separate issues. In addition to asking the court to enforce both the December agreement cancelling Affiliated's post-February 25 coverage and the April agreement cancelling its pre-February 25 coverage, it raised and fully briefed the following issues, each of which provided a complete or partial defense to respondents' claims and a ground for reversing the trial court's judgment:[2]

> 1. Whether the future-dated draw documents on the basis of which plaintiffs sought damages "conformed" to the banks' own letters of credit, or qualified as "covered" documents under the policy's "fraudulent bill of lading" or FBOL clause — because they failed to evince the exporter's relinquishment of control or actual commencement of shipment as required;

2. As summarized in Affiliated's Petition for Rehearing and/or for Rehearing En Banc, at 8-9. The American Insurance Association filed a brief *amicus curiae* in support of Affiliated, arguing that it was important to the marine insurance industry that courts enforce limitation-of-liability clauses in marine insurance policies like Affiliated's, that they enforce agreements like Affiliated's to substitute one insurer for another, and that assureds not be permitted to close their eyes to evidence of fraud like the facially deficient future-dated draw documents accepted by the banks here.

2. Whether the bank plaintiffs were barred from recovery, as District Judges John Martin and Vincent Broderick warned they would be, because they shut their eyes to red flags conspicuously warning of fraud — i.e., the facially deficient future-dated draw documents, the exporter's constantly elongating delivery schedules, and Andina's request for a further 60 days to repay its loans;[3]

3. Whether Affiliated's marine open cargo insurance policy on "shipments of coffee" covered the purely financial risk of non-existent coffee;

4. Whether the bank plaintiffs suffered any loss before Affiliated's policy was cancelled on February 25, 1986, given that it was not until August 1986 that the demand loans booked to Andina first came due, Andina defaulted, and the loans proved uncollectible;

5. Whether the policy's standard limitation-of-liability and cap on "accumulation of interests" (respectively, $8 and $16 million) could be interpreted away as the district judge did;

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3. Prior to trial, Judge Broderick, in an opinion signed for him by Judge Martin, had denied summary judgment, cautioning that damages would be unavailable to Andina if it were shown to be complicit in its affiliates' fraud, and to the banks if they knew, or should have known, that the transactions were fraudulent but nevertheless continued to extend credit to the affiliates or failed to disclose their suspicions or knowledge to Affiliated. *Chemical Bank v. Affiliated FM Ins. Co.*, 1994 U.S. Dist LEXIS 721, 1994 WL 31413 (S.D.N.Y. Jan. 25, 1994).

6. Whether this case arising out of a vast flow of ocean commerce from Colombia to New York involved marine, rather than inland risk as the district judge held, and therefore invoked the *uberrimae fidei* (utmost fidelity) doctrine requiring the insureds to have disclosed to Affiliated that their claims involved facially deficient draw documents and non-existent coffee and that they suspected Andina's complicity in the fraud, as well as application of the federal prejudgment interest rule;

7. Whether the district court denied Affiliated a fair opportunity to present its case on Andina's complicity in its corporate parent's fraud when it barred satellite deposition evidence and written affirmations from two key insiders, and dismissed videotaped deposition testimony from the arch conspirator (himself a principal of the Group and an officer and director of Andina) based on non-record material wrongly critical of the pretrial conduct of Affiliated and its trial counsel.

On February 25, 1999, the Court of Appeals rendered a decision reversing the district court and directing that judgment be entered in Affiliated's favor. Writing for a unanimous court, Chief Judge Winter held that the district court should have enforced both the December and April agreements, cancelling Affiliated's coverage both before and after February 25, 1986. Because this decision disposed of the entire case, the court did not reach or even mention any of the other issues (listed in the preceding paragraphs) which Affiliated had raised.

Respondents sought rehearing, challenging both cancellation agreements. Affiliated's brief in opposition defended the court's initial decision — and pointed out that were the appeals court to reinstate any or all of the district court's judgment, it must then reach and decide one or more of the seven issues which had been left undecided because of the court's dispositive decision on cancellation.[4] On November 8, 1999, the court rendered its decision granting rehearing, reversing its original decision — at least with respect to the April agreement. The court now concluded that *this* agreement should not be enforced, on the theory that the agreement did not explicitly purport to shift responsibility from Affiliated to the London insurers. The case was remanded to the district court to recalculate the banks' damages for losses incurred prior to February 25, 1986. Like the court's initial decision, the rehearing decision omitted any reference to the seven undecided issues which Affiliated had raised in its briefs and which provided partial or complete defenses to the now reduced award — which would still exceed $50 million.

Affiliated sought rehearing and rehearing en banc, urging the court to reinstate its original decision enforcing the April agreement, whose sole purpose, after all, was to shift responsibility from Affiliated to the London insurers. And it again insisted that the court now address for the first time the seven undecided issues, which seemed to have fallen between the cracks, with the court failing even to state —

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4. Again, the American Insurance Association filed a brief *amicus curiae*, this time defending both prongs of the court's February 25 decision.

however implausibly — that any or all of the seven issues were "without merit."[5]

On July 24, 2000, the court denied Affiliated's petition, once again omitting any reference to the seven undecided issues. The opinion in its entirety states: "Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is denied." Affiliated's request for en banc consideration was also denied, without comment on the issues. Affiliated's applications for a stay pending certiorari were denied by the court and by Circuit Justice Ruth Bader Ginzburg. Affiliated files this petition for a writ within 90 days of the July 24 denial of rehearing, pursuant to Rule 13.3.

REASONS FOR GRANTING THE WRIT

Given the basis on which the Court of Appeals initially decided the present case, its omission at first to address and decide all the issues raised by Affiliated was perfectly understandable. Its initial ruling, that the December and April agreements cancelled all of Affiliated's coverage, had, after all, rendered the other issues moot. But when, on rehearing, the court backtracked, reversed itself on the enforceability of the April agreement, and reinstated some $50 million of the district court judgment, it plainly resuscitated those still undecided issues, which ceased to be moot and now *required* decision. Despite repeated insistence from Affiliated and

5. The American Insurance Association filed its third brief *amicus curiae*, supporting enforcement of the April agreement as well as the necessity that the court address the undecided issues concerning the policy's limitation-of-liability clause and the banks' being allowed to close their eyes to evidence of fraud (the facially deficient future-dated draw documents).

from the *amicus* American Insurance Association that those other issues could not be allowed to fall between the cracks, just because the court had focused only on "cancellation," the court did fail to reach them, or even refer to them.[6] This Court should grant a writ of certiorari to review and correct the court's decision, then remand the case to the Court of Appeals to address the still unresolved issues.

A. The court's failure to address substantial and potentially dispositive issues left undecided as a result of its focus on another single issue departs from the accepted and usual course of federal appellate practice

It is elementary that a party seeking review of an adverse district court judgment under the final judgment rule has a right to have all the substantial and potentially dispositive issues it raises on the appeal adjudicated by the federal court of appeals. And the appellate court may not, as a matter of accepted federal appellate practice and procedure, arbitrarily single out and address one out of a number of such issues, while leaving other substantial issues entirely unadjudicated. The Second Circuit's extreme departure from proper appellate practice requires exercise of this Court's supervisory power.

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6. Affiliated's Response to Petitions for Rehearing, p. 19, n. 18, cautioned the court that reversal of any portion of its initial decision would resuscitate the seven undecided issues and require their adjudication. The point was argued at length in its Petition for Rehearing and/or for Rehearing En Banc, pp, 17-20, which included Appendix D consisting of more than 70 pages addressed to those undecided issues from its pre-argument briefs and from the *amicus* brief submitted by the American Insurance Association. The *amicus* made the same point in its own brief supporting Affiliated's rehearing petition.

We do not argue that an appellate court must devote equal space in its written opinions to each and every issue raised by a party. Indeed, in many situations, it is entirely appropriate for an appellate court to address one or more issues at some length, while disposing of other, truly insubstantial issues as being "without merit." That's done every day. But that's not what happened here.

1. The court never characterized the undecided issues as being "without merit"

The court below did not state, either in its November 8, 1999 opinion reversing itself on enforceability of the April agreement, or in its July 24, 2000 summary order denying Affiliated's petition for rehearing, that it was rejecting any or all of the seven fully briefed but undecided issues as "without merit." Both decisions are entirely silent on the merits of those issues.

2. None of the undecided issues could fairly be characterized as "without merit"

Both sides had briefed all seven undecided issues at length. The *amicus* American Insurance Association advised the court of the importance to the marine insurance industry of several of the issues left undecided. And even the following short summary of the arguments pertaining to just two of the undecided issues illustrates the inapplicability of any cursory "without merit" disposition.

a. The future-dated draw document issue, which the court left undecided

Consider, for example, the issue relating to the future-dated draw documents which the bank respondents blindly honored, despite the fact they neither conformed to the banks' own letters of credit nor qualified as "covered" documents under the policy's FBOL clause. As a matter of law, a document delivered today but dated tomorrow or next week cannot be a bill of lading or trucker's receipt. The problem is that such a document cannot signify, as it must, that the exporter has already relinquished control of the goods to the trucker, or that shipment has already commenced, and — by implication — that the goods actually exist. That is why New York's Commercial Code defines a "bill of lading" as a "document evidencing the receipt of goods for shipment." NYUCC Section 1-201(6) That is why Articles 47(b)(1) and 50(b) of the Uniform Customs & Practices for Documentary Credits ("UCP") make any date appearing on a purported bill of lading the date of shipment — as a matter of law. And that is why the banks' own letters of credit and the applications therefor explicitly require "bills of lading evidencing shipment from interior Colombia to Colombian seaport." In the state court suit bought by Andina in 1986, Andina, NatWest, and Rabobank each presented expert and other evidence that future-dated documents could not qualify as "bills of lading" because they failed to signify that the exporter has already relinquished control of the goods, or that shipment has already commenced. Such documents were nothing more than promises of future delivery, not evidence of actual shipment. Therefore, they neither conformed to the banks' own letters of credit, nor qualified under the UCP or New York law, and no bank could legitimately pay when

presented with such facially deficient documents.[7] In the present case, at least 85 percent of the draw documents on which the award was based were future-dated. Because, as a matter of law, these were not "bills of lading," the "FBOL" clause does not cover losses occasioned by their acceptance.

b. The federal maritime jurisdiction issue, which the court left undecided

Or consider the district court's refusal to accept that federal maritime jurisdiction applied to this case. In bringing this litigation, respondents had themselves pleaded both diversity and federal maritime jurisdiction. The evidence showed that the events in issue were part of a vast stream of coffee shipments, by truck and then by sea from Colombia to New York, covered first by Affiliated's, then by the London insurers' marine open cargo insurance policies. The district court's ruling (citing no cases) that only inland, not marine, risk was involved had two serious consequences. First, that ruling freed respondents from the federal maritime jurisdiction's strict *uberrimae fidei* doctrine. That doctrine would bar recovery if the banks knew or should have known that they were paying on future-dated "truck bills of lading"

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7. The Appellate Division agreed. It noted that "The bill of lading was supposed to show that the coffee was actually in existence, that it had left the control of the growers and that it was in the hands of the shipper and en route from the interior of Colombia to a seaport." It excused the banks from paying on such documents, holding that "The postdating of bills of lading is not only a departure from requirements of the letters of credit but also constitutes a form of fraudulent practice." *Andina Coffee, Inc. v. National West. Bank, et al.*, 160 A.D.2d 104, 106, 110, 560 N.Y.S.2d 1, 5, 13 (1st Dept. 1990), *appeal granted*, 167 A.D.2d 991, 562 N.Y.S.2d 933 (1st Dept. 1990), *appeal withdrawn*, 77 N.Y.2d 957 (1991).

which neither conformed to their letters of credit nor were legitimate draw documents under the law, and that non-existent coffee was involved — and then failed promptly to disclose these facts, or their suspicions of Andina's complicity, to Affiliated. Although they knew about the facially deficient draw documents from the start, and learned of the non-existent coffee no later than August 1986, Andina and the banks failed to disclose these facts for four full years, hiding behind bogus explanations because they feared that Affiliated' policy did not cover losses related to non-existent coffee. Second, the district court's jurisdictional ruling required it to impose New York's 9 percent prejudgment interest rate, rather than the discretionary federal one.

The Second Circuit's own controlling decisions require the opposite result on both issues, for they permit an "inland risk" finding only when there never was an intention to ship by sea.[8] Here, the Group shipped nearly 14 million bags of coffee to New York by sea, and all the "lost coffee" was designated for seaboard shipment.

3. The court below recognizes the sharp distinction between rejecting an argument, even with a simple "without merit" tag, and remaining silent as to its merits

In Second Circuit jurisprudence, omission by the court of any mention of an issue fairly raised on appeal has important substantive significance. For in the Second Circuit

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8. *Sirius Ins. Co. Ltd. v. Collins*, 16 F.3d 34, 36 (2d Cir. 1994); *In re Balfour MacLaine Int'l Ltd.*, 85 F.3d 68 (2d Cir. 1996); and *Atlantic Mut. Ins. Co. v. Balfour MacLaine Int'l Ltd.*, 968 F.2d 196 (2d Cir. 1992).

and elsewhere, "if an appeal is taken and the appellate court affirms on one ground and disregards the other, there is no collateral estoppel as to the unreviewed ground." *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986). *See also Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168 (5th Cir. 1981), where the court observed that "[T]he general rule is that if a judgment is appealed, collateral estoppel only works as to those issues specifically passed upon by the appellate court." And it has long been the rule in the Second Circuit that when an appellate court affirms a judgment on only some of the grounds upon which the trial court ruled, the unaddressed issues are not entitled to *res judicata* effect. *Moran Towing & Trans. Co. v. Navigazione Liberia Triestina*, 92 F.2d 37, 40 (2d Cir. 1937) (A. Hand, J.). Nor, on remand, is such an issue, which is neither explicitly addressed nor implicitly decided, deemed "law of the case." *See United States v. Minicone*, 994 F.2d 86, 89 (2d Cir. 1993), where the court applied "law of the case" on the ground that, in its earlier decision, it had specifically noted that the claims in question "are without merit."

The rule in most circuits is that no inference is to be drawn from judicial silence — especially in response to petitions for rehearing. As one federal appellate court stated recently in *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1479 (Fed. Cir. 1998),

> Courts normally do not respond to petitions for rehearing and it would be a mistake to conclude that a court's non-response to an argument made in a rehearing petition necessarily means that the Court has rejected that argument on the merits.

And in *Luckey v. Miller*, 929 F.2d 618, 621-22 (11th Cir. 1991), another federal appellate court ruled that no

implication or inference regarding the merits is to be drawn from summary denial of rehearing *en banc*. In short, despite the clear rule in the federal appellate courts that silence, especially on rehearing, is not to be deemed a substantive decision, the court below treated the seven "undecided" issues with silence. Doing so represented a grave departure from accepted federal appellate practice and procedure.

4. The court's failure to address and decide the undecided issues not only represents a grave departure from accepted federal appellate practice, but critically impaired Affiliated's right to appeal under Section 1291, procedural due process, and fundamental fairness

The seven issues left undecided by the Court of Appeals were substantial and potentially dispositive, were fully briefed by both sides, and several of them were shown to be of great importance to the marine insurance industry by the *amicus* American Insurance Association.

Under 28 U.S.C. § 1291, parties have the right to appeal an adverse judgment to the appropriate court of appeals which has a "virtually unflagging obligation" to exercise the jurisdiction conferred upon it. *Cf. Colorado River Water Conser. Dist. v. United States*, 424 U.S. 800, 817 (1976), dealing with the obligation of federal courts to exercise jurisdiction in light of the abstention doctrine. Equally important, Section 1291 embodies the federal "final judgment" rule, which requires parties to combine all their claims of error into a single post-judgment appeal, rather than prosecute, as in New York state court practice, "a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry

of judgment." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), *quoting Cobbledick v. United States*, 309 U.S. 323, 325 (1940). Absent the final judgment rule, Affiliated could have separately brought each and every one of the seven undecided issues up for appellate review — after denial of its motions and prior to the trial and final judgment. That would have insured full appellate attention to its contentions that no insurance coverage existed for respondents' losses on future-dated draw documents which were not "covered" documents within the meaning of its policy; that the banks were barred from coverage because they had shut their eyes to red flags warning of fraud; that the policy covering "shipments of coffee" did not insure against financial losses resulting from non-existent coffee; that the banks' losses all occurred after Affiliated's policy was cancelled on February 25; that the policy's standard limitation-of-liability clause and cap on "accumulation of interests" sharply constricted respondents' claims; that federal maritime jurisdiction applied; and that Affiliated was entitled to take depositions of key witnesses by satellite and to introduce written affirmations from key witnesses otherwise unavailable for trial. All these issues had been or could have been raised on pre-trial motions over the years preceding the 1997 bench trial. The manner in which the Court of Appeals proceeded in this case had the unacceptable effect of denying Affiliated's right to appellate review of any of these substantial and potentially dispositive defenses. That failure exposes a potentially fatal risk latent in the final judgment rule, which neither the Congress nor the courts ever intended it to have.

It is implicit in the mandatory appellate jurisdiction and the closely related final judgment rule that the federal courts of appeals are obligated to decide all issues necessary to a

final appellate disposition. Without the concomitant judicial duty to decide all necessary issues, the requirement that parties save their claims of error until after final judgment and their related right to have all such errors reviewed on appeal would become — as in this case — a treacherous requirement wrapped up in a hollow right.

What happened here frustrates the appellate scheme explicitly enacted by Congress, implicitly protected by the due process clause,[9] and manifestly required as a matter of fundamental fairness.

Petitioner's main and reply briefs raised and argued eight substantial issues, each of which provided a complete or partial defense requiring reversal of the district court's $92 million award. Because the Court of Appeals initially believed that just one of those eight issues, the cancellation issue, entitled Affiliated to complete relief, it quite properly left the other seven issues undecided — for they were, at least for the moment, moot. But when, on rehearing, the court backtracked, reversed itself on one aspect of the cancellation issue, and reinstated over $50 million of the judgment against Affiliated, the seven undecided issues ceased to be moot. The court's mandatory appellate jurisdiction combined with the final judgment rule, and Affiliated's statutory and constitutional rights, required that those issues now be addressed. This, the court failed to do. Those seven issues, which the final judgment rule prevented Affiliating from separately raising on an appeal prior to trial, were inexcusably allowed to fall between the cracks.

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9. There may be no due process right to appellate review, but once such review is provided by statute, due process forbids its being reduced to a lottery, with a party's rights turning on which of several issues an appeals court arbitrarily chooses to hear.

If the court's failure to address those no-longer-moot issues is allowed to go uncorrected, Affiliated will have lost an appeal it may well have been entitled to win, and federal appellants will have their cherished right to full adjudication of their post-final judgment appeals turned into a lottery. Where a number of issues are raised, their chances will turn on which of those issues the court happens to choose to address, while the other issues — even if equally substantial or meritorious — are consigned to the dustbin. That is not what the federal right to appeal means, and it is not an appropriate or legitimate way to run the federal appellate courts. Surely, this is not the result contemplated by Congress when it created the right to appeal and final judgment rule embodied in Section 1291. Nor is it consistent with fundamental fairness and procedural due process.

B. The court's failure to address substantial and potentially dispositive issues left undecided as a result of its exclusive focus on another single issue conflicts with decisions of this Court and of other Circuits, including the Eleventh and Federal Circuits

1. The conflict with this Court's teaching

It is the teaching of this Court that scrupulous care must be taken to address and decide all substantial and potentially dispositive issues raised on appeal, even where the court's attention may initially focus on a single issue that is ultimately rejected.

On the criminal side, this Court applies the rule to both federal and state appeals. In *Benton v. Maryland*, 395 U.S. 784, 798 (1969), for example, this Court remanded to the state court with express instructions to decide certain

evidentiary issues which had been temporarily shelved by reason of an erroneous decision on double jeopardy; once those issues were no longer moot, they had to be reached and decided. Similarly, in *United States v. Wilson*, 420 U.S. 332 (1975), after reversing an erroneous double jeopardy decision by the Third Circuit, the Court remanded with instructions that the federal appellate court consider for the first time other issues its original decision had allowed it to ignore.

This Court requires the same scrupulous attention to deciding previously undecided issues in civil cases. A leading case is *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398, 402 (1960), where the Court reversed the Sixth Circuit for focusing single-mindedly on one of the Board's theories ("its preoccupation") and then dismissing its application without ruling upon the Board's "alternate theory of liability" — that respondent's various companies should be deemed a "single enterprise." The same lesson is taught by such decisions as *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 182 (1976), reversing and remanding to the Ninth Circuit to consider an issue rejected in the district court but not addressed by the appellate court, and *Wood v. Strickland*, 420 U.S. 308, 326-27 (1975), remanding for adjudication of an issue not addressed in either of the lower courts.

2. The conflict with decisions of other courts of appeals

The decisions below also conflict with those of other circuits. In *Tucker v. Kemp*, 762 F.2d 1496 (11th Cir. 1985) (en banc), the full court required a panel explicitly to address and decide issues temporarily rendered moot by an earlier panel decision reversed by the full court. There, and in

contrast to the present case, the "other issues" were not allowed to fall between the cracks. Similarly, in *W.L. Gore & Associates, Inc. v. Intern Medical Prosthetics Research*, 975 F.2d 858 (Fed. Cir. 1992), the Federal Circuit on rehearing reversed itself after initially dismissing an appeal, when it realized that its initial decision made a motion to dismiss a cross appeal no longer moot. It did the right thing, restoring the motion for plenary consideration.

CONCLUSION

It frequently happens that a federal appellate court initially disposes of an appeal on a single ground, thereby mooting other substantial issues raised by the appellant, only to find that subsequent events resuscitate the once mooted issues. When this does occur, Section 1291, procedural due process, and fundamental fairness impose on the court an "unflagging obligation," after final judgment in the district court, to address and decide the issues once they have ceased to be moot. That is the teaching of this Court, as well as other federal courts of appeals, including the Eleventh and Federal Circuits.

Affiliated should not be required to pay respondents more than $50 million on claims against which it has substantial and meritorious defenses — seven of which it has raised and fully briefed after final judgment in the district court, but which the Court of Appeals omitted ever to reach and decide. The federal appellate process, as shaped by the final judgment rule, should not be a lottery. Affiliated's petition for a writ of certiorari to review the Court of Appeal's departure from accepted federal appellate practice, the requirements of § 1291, procedural due process, and fundamental fairness should be granted. The judgment of the Court of Appeals should be reversed, and the case remanded to it with instructions to adjudicate so many of the undecided issues as is necessary for a final disposition of the appeal.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED NOVEMBER 8, 1999

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 1999

(Petition for Rehearing
Filed: March 26, 1999 Decided: November 8, 1999)

Docket No. 97-7982

ON PETITION FOR REHEARING BY THE PANEL

CHEMICAL BANK, EUROPEAN AMERICAN BANK, BANQUE PARIBAS, AMERICAN EXPRESS BANK LTD., NATWEST BANK NATIONAL ASSOCIATION and RABOBANK NEDERLAND,

Plaintiffs-Appellees,

— v. —

AFFILIATED FM INSURANCE CO.,

Defendant-Appellant,

ANDINA COFFEE, INC. and ANDINA TRADING CORP.,

Consolidated Plaintiffs-Appellees,

LLOYD'S SYNDICATE NO. 446, LLOYD'S SYNDICATE NO. 418, LLOYD'S SYNDICATE NO. 406, LLOYD'S SYNDICATE NO. 40, LLOYD'S SYNDICATE NO. 367, LLOYD'S SYNDICATE NO. 34,

Appendix A

LLOYD'S SYNDICATE NO. 334, LLOYD'S SYNDICATE NO. 321, LLOYD'S SYNDICATE NO. 309, LLOYD'S SYNDICATE NO. 304, LLOYD'S SYNDICATE NO. 162, LLOYD'S SYNDICATE NO. 123, LLOYD'S SYNDICATE NO. 108, LLOYD'S SYNDICATE NO. 1014, LLOYD'S SYNDICATE NO. 52, INSURANCE COMPANY OF NORTH AMERICA, HOME INSURANCE COMPANY, PHOENIX ASSURANCES PUBLIC LIMITED COMPANY, CORNHILL INSURANCE PLC., COMMERCIAL ASSURANCE CO. PLC, RIVER THAMES INSURANCE CO. LTD., SOVEREIGN MARINE & GEN. INS. CO., ASSICURAZIONI GENERALI S.P.A., LLOYD'S SYNDICATE NO. 447, PHOENIX 'L' ACCOUNT, NORWICH UNION FIRE INSURANCE SOCIETY LTD., NORTHERN ASSURANCE COMPANY LIMITED, LLOYD'S SYNDICATE NO. 202, LLOYD'S SYNDICATE NO. 745, LLOYD'S SYNDICATE NO. 735, LLOYD'S SYNDICATE NO. 725, LLOYD'S SYNDICATE NO. 697, LONDON & HULL MARITIME INSURANCE COMPANY LIMITED, LLOYD'S SYNDICATE NO. 843, LLOYD'S SYNDICATE NO. 65, LLOYD'S SYNDICATE NO. 831, LLOYD'S SYNDICATE NO. 803, LLOYD'S SYNDICATE NO. 80, LLOYD'S SYNDICATE NO. 633, LLOYD'S SYNDICATE NO. 483, LLOYD'S SYNDICATE NO. 455, LLOYD'S SYNDICATE NO. 625, LLOYD'S SYNDICATE NO. 62, LLOYD'S SYNDICATE NO. 575, LLOYD'S SYNDICATE NO. 535 and LLOYD'S SYNDICATE NO. 448,

Defendants.

Before:

WINTER, *Chief Judge*, CARDAMONE, *Circuit Judge*, and CARMAN,* *Judge.*

* * *

* The Honorable Gregory W. Carman, Chief Judge of the United States Court of International Trade, sitting by designation.

Appendix A

WINTER, *Chief Judge*:

Appellees have petitioned this panel for rehearing to reconsider its decision in *Chemical Bank v. Affiliated FM Ins. Co.*, 169 F.3d 121 (2d Cir. 1999). Pursuant to our request, appellant submitted a response. *See* Fed. R. App. P. 40(a)(3).

We assume familiarity with, and adopt the defined terms from, our earlier decision. Appellees seek reconsideration of (i) whether the Banks ratified T & N's unauthorized decision to cancel the Affiliated Policy, and (ii) whether the April Agreement affects the scope or period of the Affiliated Policy. We deny the petition on the first ground, grant it on the second, and hold that the Affiliated Policy's "other insurance clause" renders Affiliated liable to appellees for all losses due to payments made on fraudulent bills of lading before February 25, 1986. Accordingly, we vacate our earlier disposition of this appeal, affirm the district court's judgment as to Andina, vacate it as to the Banks, and remand the case with instructions to enter judgment for the Banks in the amount of their respective FBOL losses incurred before February 25, 1986.

Regarding the first argument, our earlier decision held that the Affiliated Policy was effectively terminated as to the Banks on February 25, 1986 because the Banks ratified T & N's termination of that policy. *See Chemical Bank*, 169 F.3d at 128-29. In their petitions for rehearing, the Banks describe our holding as establishing a "dangerous rule" that deprives them of their contractual right to 10 days' notice prior to cancellation and allows insurance brokers to enter into unauthorized agreements on behalf of uninformed lenders. This argument entirely misstates our decision.

Appendix A

Our decision did not hold that T & N or Affiliated had actual or apparent authority to terminate the Affiliated Policy. Rather, we expressly relied upon a "narrower" ground, namely that, on the particular facts of this case, the Banks ratified the February 25, 1986 termination of the Banks' coverage under the Affiliated Policy. *Id.* at 128. Although a ratified act is given effect as if originally authorized, the doctrine of ratification is in no way implicated where an agent acts with authority, actual or apparent. *See Holm v. C.M.P. Sheet Metal, Inc.*, 455 N.Y.S.2d 429, 432 (App. Div. 1982) ("Ratification is the express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority. . . . Ratification relates back [to] and supplies original authority. . . ."); *see also Leviten v. Bickley, Mandeville & Wimple, Inc.*, 35 F.2d 825, 827 (2d Cir. 1929) ("Ratification [is] the subsequent adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him while purporting to act as his agent."); *Restatement (Second) of Agency* § 82 cmt. b (1958) ("Ratification is not a form of authorization, but . . . upon ratification the consequences of the original transaction are the same as if it had been authorized . . . ."); Harold Gill Reuschlein & William A. Gregory, *The Law of Agency & Partnership* § 27, at 72 (2d ed. 1990) ("[Ratification] is the affirmance of an act done originally without authority.").

Accordingly, by resting our decision on ratification grounds, we held neither that an insurance broker's unauthorized act of entering into an agreement on a lender's behalf is valid absent the lender's ratification nor that the Banks here lacked a contractual right to 10 days' notice. To

the contrary, we held only that the Banks had to assert that right instead of remaining silent for years after receiving the termination notice and after expressly alleging in their state court complaints against T & N that the Affiliated Policy was validly terminated on February 25, 1986. We therefore deny the Banks' petitions insofar as they seek reconsideration of the effective termination date of their coverage.

We are persuaded, however, by appellees' second argument, namely that the April Agreement neither narrowed the scope nor shortened the period of the Affiliated Policy. In our original decision, we held that T & N had apparent authority to enter into the April Agreement on the Banks' behalf and that the April Agreement allocated losses among the London insurers and Affiliated, with the result that Affiliated was not liable to appellees for certain FBOL losses incurred prior to the termination date of the Affiliated Policy, February 25, 1986. *See Chemical Bank*, 169 F.3d at 129-30. We now vacate that portion of our original decision and hold that the Affiliated Policy covered the Banks and Andina for the losses in question.

Although our prior decision noted that no endorsement corresponding to the April Agreement was added to the Affiliated Policy, we failed to note, or at least perceive the implications of, the fact that the April Agreement did not even purport to narrow the coverage of the Affiliated Policy. Moreover, the Affiliated Policy's so-called "overlap clause" provides that "in case of any insurance upon the said interest subsequent in date to this Policy, [Affiliated] shall nevertheless be answerable for the full extent of the sum insured by [it] . . . ."

Appendix A

The parties dispute whether the April Agreement covers FBOL losses incurred on certain non-existent shipments purportedly made within Colombia before February 25, 1986, but even if it does, its failure even to purport to amend the Affiliated Policy renders it at best "insurance upon" a risk covered by that Policy taken out "subsequent" to the date of the Policy. Under the express terms of the overlap clause, Affiliated is fully liable for covered losses even if a later insurer — here, for the sake of argument, the London insurers — has covered the same losses. Thus, Affiliated is liable to the Banks and Andina for all FBOL losses incurred before February 25, 1986, the effective termination date of the Affiliated Policy.

In its opinion, the district court held that the Affiliated Policy was terminated as to Andina on February 25, 1986 and that Affiliated was liable to Andina for all FBOL losses incurred before that date. *See Chemical Bank v. Affiliated FM Ins. Co.*, 970 F. Supp. 306, 330-31 (S.D.N.Y. 1997). Accordingly, the district court restricted its finding on Andina's damages to payments made on FBOLs before February 25, 1986, and entered a judgment for Andina in the amount of $2,975,000, plus pre-judgment interest, reflecting that finding. *See id.* at 324 (finding 47), 332. Because we agree with the district court that the Affiliated Policy covered Andina's FBOL losses incurred before February 25, 1986 and find no error in the district court's damages award, we affirm the judgment for Andina.

As to the Banks, however, the district court held that their coverage under the Affiliated Policy did not terminate until March 21, 1986. *See id.* at 330. Accordingly, the court

calculated each Bank's damages on the basis of FBOL losses incurred before March 21, 1986, without separately setting forth damages for FBOL losses incurred before February 25, 1986. *See id.* at 324, 332. Given our ruling that the Banks are covered under the Affiliated Policy for payments made on FBOLs before February 25, 1986, but not afterwards, we remand to the district court to make findings as to each Bank's damages for FBOL losses incurred before February 25, 1986 and to enter a corresponding judgment for each Bank and against Affiliated.

We therefore vacate our original disposition of this appeal, affirm the judgment of the district court for Andina Coffee, Inc., vacate the judgment as to the Banks, and remand with instructions to the district court to (i) make findings as to each Bank's damages for FBOL losses incurred before February 25, 1986, and (ii) enter a corresponding judgment for each Bank against Affiliated.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED FEBRUARY 25, 1999

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 1997

Argued: May 18, 1998 Decided: February 25, 1999)

Docket No. 97-7982

CHEMICAL BANK, EUROPEAN AMERICAN BANK, BANQUE PARIBAS, AMERICAN EXPRESS BANK LTD., NATWEST BANK NATIONAL ASSOCIATION, and RABOBANK NEDERLAND,

Plaintiffs-Appellees,

— v. —

AFFILIATED FM INSURANCE CO.,

Defendant-Appellant,

ANDINA COFFEE, INC. and ANDINA TRADING CORP.,

Consolidated Plaintiffs-Appellees,

LLOYD'S SYNDICATE NO. 446, LLOYD'S SYNDICATE NO. 418, LLOYD'S SYNDICATE NO. 406, LLOYD'S SYNDICATE NO. 40, LLOYD'S SYNDICATE NO. 367, LLOYD'S SYNDICATE NO. 34, LLOYD'S SYNDICATE NO. 334, LLOYD'S SYNDICATE NO. 321, LLOYD'S SYNDICATE NO. 309, LLOYD'S SYNDICATE NO. 304,

Appendix B

LLOYD'S SYNDICATE NO. 162, LLOYD'S SYNDICATE NO. 123, LLOYD'S SYNDICATE NO. 108, LLOYD'S SYNDICATE NO. 1014, LLOYD'S SYNDICATE NO. 52, INSURANCE COMPANY OF NORTH AMERICA, HOME INSURANCE COMPANY, PHOENIX ASSURANCES PUBLIC LIMITED COMPANY, CORNHILL INSURANCE PLC., COMMERCIAL ASSURANCE CO. PLC, RIVER THAMES INSURANCE CO. LTD., SOVEREIGN MARINE & GEN. INS. CO., ASSICURAZIONI GENERALI S.P.A., LLOYD'S SYNDICATE NO. 447, PHOENIX 'L' ACCOUNT, NORWICH UNION FIRE INSURANCE SOCIETY LTD., NORTHERN ASSURANCE COMPANY LIMITED, LLOYD'S SYNDICATE NO. 202, LLOYD'S SYNDICATE NO. 745, LLOYD'S SYNDICATE NO. 735, LLOYD'S SYNDICATE NO. 725, LLOYD'S SYNDICATE NO. 697, LONDON & HULL MARITIME INSURANCE COMPANY LIMITED, LLOYD'S SYNDICATE NO. 843, LLOYD'S SYNDICATE NO. 65, LLOYD'S SYNDICATE NO. 831, LLOYD'S SYNDICATE NO. 803, LLOYD'S SYNDICATE NO. 80, LLOYD'S SYNDICATE NO. 633, LLOYD'S SYNDICATE NO. 483, LLOYD'S SYNDICATE NO. 455, LLOYD'S SYNDICATE NO. 625, LLOYD'S SYNDICATE NO. 62, LLOYD'S SYNDICATE NO. 575, LLOYD'S SYNDICATE NO. 535, and LLOYD'S SYNDICATE NO. 448,

Defendants.

Before:

WINTER, *Chief Judge*, CARDAMONE, *Circuit Judge*, and CARMAN,* *Judge*.

* * *

* The Honorable Gregory W. Carman, Chief Judge of the United States Court of International Trade, sitting by designation.

Appendix B

WINTER, *Chief Judge*:

Affiliated FM Insurance Co. ("Affiliated") appeals from a judgment, entered after a bench trial before Judge Pollack, awarding Chemical Bank and five other banks (collectively, the "Banks")[1] approximately $47 million in damages and $45 million in prejudgment interest. The award was made under a maritime open cargo insurance policy issued by Affiliated to Andina Coffee, Inc. ("Andina"), a New York-based coffee importer. The policy named the Banks as additional insureds. *See Chemical Bank v. Affiliated FM Ins. Co.*, 970 F. Supp. 306, 312 (S.D.N.Y. 1997). For the reasons that follow, we conclude that the policy had been validly terminated at the time of the losses and accordingly reverse with instructions to enter judgment for Affiliated.

BACKGROUND

The present dispute arose from the presentation of fraudulent draw documents to the Banks in 1986 by several Colombian export businesses owned by the Echiverri family. The Echiverri family's companies (the "Echiverri Group" or the "Group") were collectively one of the two largest privately-owned coffee exporters in Colombia. In 1974, the Group, along with four other coffee exporters, established New York-based Andina to act as the exporters' financing agent in the United States. By 1982, Andina was owned

1. The Banks are Chemical Bank, European American Bank, Banque Paribas, American Express Bank Ltd., NatWest Bank National Association, and Rabobank Nederland. Chemical Bank is now known as The Chase Manhattan Bank and NatWest Bank, N.A. is now Fleet Bank, N.A.

entirely by the Echiverri Group and was the Group's exclusive sales agent.

Typically, the Group would begin a commercial cycle by contracting with an American roaster for the sale and purchase of coffee. The Group would then inform Andina of the contract, and Andina would open a letter of credit in the Group's favor with one of the Banks. Once the Group had obtained and processed the coffee in Colombia, it would release the coffee to a trucker who would issue a truck bill of lading ("TBOL") — a commercial invoice that would, when presented to the Bank issuing the relevant letter of credit, allow the Group to draw upon the letter of credit. When the Group drew upon the letter of credit, Andina would incur a loan chargeable against its line of credit with the particular Bank. Andina would then arrange for the coffee to clear customs in the United States, deliver it to the customer, and collect payment. Andina would use the proceeds from the sale to repay the corresponding loan. This arrangement ran smoothly until 1986. *See Chemical Bank*, 970 F. Supp. at 311.

In July 1980, Andina purchased through Trinder & Norwood ("T & N"), Andina's longtime general insurance broker, a marine open cargo insurance policy issued by Affiliated (the "Affiliated Policy" or "Policy"). The Affiliated Policy generally covered goods lost in shipment. However, the so-called FBOL clause — "FBOL" being the acronym for "fraudulent bills of lading" — also provided coverage for "loss or damage occasioned through the acceptance by [Andina] and/or their agents or shippers of fraudulent Bills of Lading." The Affiliated Policy required

Affiliated to provide Andina with 90 days' written notice of cancellation.

As a condition of financing Andina's transactions with the Echiverri Group, the Banks required Andina to procure suitable insurance coverage for itself and to add the Banks to the policy. *See Chemical Bank*, 970 F. Supp. at 321-22. Accordingly, Andina directed T & N to add each Bank to the Affiliated Policy as an additional insured. Each Banker's endorsement recited in pertinent portion that:

> This insurance, as to the interest of the Bank, shall not be impaired nor invalidated by any act or neglect of the named Assured [i.e., Andina] nor by failure to comply with any warranty or condition over which the Bank has no control; and this policy shall not be cancelled nor materially changed as to the interest of the Bank unless 10 days' . . . prior written notice of such change or cancellation shall have been given to the Bank.[2]

In the summer of 1985, Affiliated advised T & N that it wished to cancel the Policy. On November 27, 1985, Affiliated gave T & N written notice of cancellation of the Policy effective March 1, 1986. T & N, fearing that an insurer's unilateral cancellation would make it difficult for

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2. Nothing in the record indicates that T & N added this clause to the Affiliated Policy at the request of the Banks. Insofar as the record sheds light on the contractual relationship between the Banks and Andina, it reveals only the Banks' desire that Andina and the Banks have unbroken insurance with suitable coverage.

Andina to secure substitute coverage, successfully persuaded Affiliated in December 1985 to rescind its notice of cancellation. In exchange for that rescission, T & N — at Andina's direction — promised to obtain replacement insurance as soon as possible and to inform Affiliated of the actual date of cancellation.

On or about February 25, 1986, T & N obtained from Hogg Robinson, a London broker, a cover note providing that a new policy (the "London Policy"), issued by certain Lloyd's syndicates and other insurance companies (collectively, the "London insurers"), was effective as of that date.[3] T & N immediately telexed both Affiliated and Andina to confirm that the Affiliated Policy was cancelled and replaced with the London Policy. T & N did not send a notice of cancellation to the Banks; William Fieldman, a T & N broker, testified that sending such notice is normally the responsibility of the insurer, a point that David A. Pemmerl, a manager for Affiliated, confirmed.[4] On March 11, 1986, Affiliated sent to the Banks a notice stating that the Affiliated Policy was cancelled as to all shipments made on or after February 25, 1986. No Bank voiced any objection to the termination of the Affiliated Policy as of that date, to the terms of the London Policy, or to the lack of prior notice of cancellation.

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3. No party claims that the coverage of the London Policy differed materially from the Affiliated Policy. William Fieldman, a broker with T & N, testified that the two policies were "on par" with one another.

4. Pemmerl maintained, however, that 10 days' advance notice was impossible because T & N chose the date of cancellation.

Appendix B

Because some shipments of coffee had purportedly been in transit in Colombia prior to February 25, 1986, but had not been shipped by that date, T & N encountered problems in allocating premium payments between the Affiliated and London Policies. On April 22, 1986, T & N agreed with Affiliated, Hogg Robinson, and the London insurers that the London Policy would be amended to cover all interior shipments made before February 25, 1986, except for those for which ocean bills of lading had already been issued. An endorsement embodying this agreement (the "April Agreement") was added to the London Policy, but no corresponding endorsement was added to the Affiliated Policy. No notice of the April agreement was given to the Banks.

Also in April, an increasing lag between the Echiverri Group's delivery of TBOLs to Andina and its shipment of coffee developed. Worse, in August 1986, the Banks and Andina learned that the coffee described in several TBOLs did not exist and that the Echiverri Group had been using the money drawn on the Banks' letters of credit to finance other debts.

Upon discovery of the fraud, each Bank provided Affiliated and the London insurers with written proofs of loss. With the exception of NatWest, which sent proofs of loss to all insurers for all periods of time, each Bank submitted claims against Affiliated for losses occurring before February 25, 1986, and against the London insurers for losses occurring on or after that date.[5] Both insurers

5. It was not until March 3, 1989, nearly two and a half years after the initial proofs of claims were filed, that any Bank (save for NatWest, which disregarded all dates, *see supra*) submitted proofs to Affiliated for losses occurring after February 25, 1986.

refused to pay the claims. The London insurers asserted that the London Policy was void *ab initio* due to alleged placing errors and non-disclosure by T & N of the fact that Affiliated had sent a notice of cancellation in November 1985. *See Chemical Bank*, 970 F. Supp. at 324. Affiliated contended, *inter alia*, that the Affiliated Policy did not cover losses resulting from the acceptance of fraudulent TBOLs that described non-existent coffee. *See id.* at 329.

In 1987, the Banks sued T & N in New York state court. In these suits, the Banks alleged that T & N had been their broker during the term of the Affiliated Policy, had been the intermediary between them and Affiliated, and had acted on their behalf in undertaking to replace the Policy.[6] The Banks conceded in their complaints that the Affiliated Policy was terminated on February 25, 1986.[7] These suits were ultimately settled.

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6. Each appellee/plaintiff Bank included the following assertion in its state court pleading on this matter. "Upon information and belief, during the term of the AFM [Affiliated] Policy, T & N continued *to act as the insurance broker for Andina and for and on behalf of [individual bank] and other banks* in connection with the maintenance and supervision of said policy and as an intermediary between the Assureds and the insurer, AFM." *See* Complaint, *American Express Bank LTD v. Trinder & Norwood Inc.*, Supreme Court of the State of New York County of New York; *Chemical Bank*, 970 F. Supp. 306, Trial Record E-3530, Paragraph 8, p. 3. (emphasis added).

7. Each appellee/plaintiff Bank included the following assertion in its state court pleading on this matter. "T & N never advised [individual bank] or Andina that the AFM [Affiliated] Policy did

(Cont'd)

Appendix B

Also in 1987, five of the six Banks filed the now-consolidated suits in the Southern District against Affiliated and the London insurers.[8] Initially, the Banks' complaints asserted claims against Affiliated only for those losses that occurred before February 25, 1986. The complaints were amended in 1989 to allege that the Affiliated Policy covered post- February 25 shipments because Affiliated had failed to adhere to the 10-day notice-of-cancellation provision in the Policy. Five of the Banks also asserted claims against Hogg Robinson. Each of these complaints alleged that T & N had been the Banks' broker and that the London Policy was in place and was binding on the London insurers. These actions were later consolidated and assigned to Judge Broderick, who made several pretrial rulings, including a determination that the FBOL clause covered purported shipments of nonexistent coffee. *See Chemical Bank v. Affiliated FM Ins. Co.*, 815 F. Supp. 115 (S.D.N.Y. 1993). Eventually, all claims against the London insurers and Hogg Robinson were settled, and the case was reassigned to Judge Pollack.

A bench trial was held in May and June 1997. The district court held that: (i) T & N, by agreement with Affiliated and

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not remain in force from the date of its inception on or about July 23, 1980, *up to and including on or about February 25, 1986, when the AFM Policy was terminated.*" *See* Complaint, *American Express Bank LTD v. Trinder & Norwood Inc.*, Supreme Court of the State of New York County of New York; *Chemical Bank*, 970 F. Supp. 306, Trial Record E-3530, Paragraph 7, p. 3. (emphasis added).

8. The sixth Bank, European American Bank, filed suit in 1989 and asserted claims only against Affiliated.

the London insurers, purported to cancel the Affiliated Policy as of February 25, 1986, and replace it with the London Policy, *see Chemical Bank*, 970 F. Supp. at 312, 325; (ii) the London Policy became effective as of that date, *see id.* at 326; (iii) as to Andina, the Affiliated Policy was terminated on that date, *see id.* at 330; but (iv) as to the Banks, the Affiliated Policy was not terminated until March 21, 1986, ten days after Affiliated sent notice of the cancellation to the Banks, *see id.* at 322, 325, 330.

As to the conclusion that coverage of the Banks under the Affiliated Policy terminated only on March 21, 1986, the district court reasoned that each Bank was contractually entitled to 10 days' prior notice of cancellation; that T & N had no actual or apparent authority to waive that provision on behalf of the Banks, *see id.* at 330; and that, because T & N had not "purported" to act on behalf of the Banks with respect to cancellation or replacement of the Affiliated Policy and because no Bank knew that the London insurers would later assert that the London Policy was void, the Banks did not ratify any such waiver of notice, *see id.* at 330-31. Finally, the district court found that the so-called April Agreement was ineffective because the Banks were never told of it. *See id.* at 331. Because each loss claimed by the Banks related to purported shipments occurring on or before March 21, 1986, the district court concluded that the Affiliated Policy covered each such loss. *See id.* Accordingly, the court entered judgment for the Banks.

DISCUSSION

Affiliated makes several claims of error on appeal, but the dispositive issue is whether the Banks are bound by

Appendix B

T & N's cancellation and replacement of the Affiliated Policy on February 25, 1986, and by T & N's subsequent April Agreement allocating the respective liabilities under the Affiliated and London Policies.

In addressing these questions, it is important to define the issues that are not seriously disputed. T & N was clearly the Banks' agent in obtaining and maintaining the Affiliated Policy.[9] Indeed, the major premise of the $92 million judgment for the Banks entered in the present action is that T & N obtained from Affiliated an insurance policy enforceable by the Banks. In fact, the only party with whom Affiliated ever dealt regarding coverage of the Banks was T & N.

T & N's authority was derived from Andina. The Banks required that Andina purchase insurance for itself and for them.[10] By any standard, that made Andina the Banks' agent for the purpose of obtaining and maintaining unbroken insurance coverage for the Banks. The only limits on Andina's authority in the record were the endorsements quoted above that contained the 10-day notice provision. Apart from those endorsements, T & N had no notice of any limits on Andina's authority. Morever, while the Banks were additional insureds, it was Andina that paid the premia, and the Banks' coverage under the Affiliated Policy was

9. *See supra* notes 6 and 7.

10. There is no evidence in the record concerning the terms of the agreement between Andina and the Banks under which Andina agreed to procure insurance. Specifically, there is no evidence that Andina and the Banks bargained for the 10 days' notice provision.

maintained at all times only at Andina's direction, save again for the protection of the endorsements.

It follows that, when Affiliated sought in 1985 to terminate the Policy, it was seeking to end coverage as to both Andina and the Banks. They were covered by the same Policy and termination of the Policy would by definition end that coverage. In December 1985, when T & N, on Andina's behalf, asked Affiliated to withdraw the cancellation notice in return for T & N's promise to secure substitute insurance, the request for withdrawal, to be effective, also had to include, and be understood by Affiliated to include, Affiliated's forbearance with regard to the Banks' coverage. It would hardly have met Andina's, T & N's, or the Banks' needs in December 1985 to have the cancellation notice to Andina withdrawn only to have Affiliated the next day give the requisite 10 days' notice cancelling the Banks' coverage. Nor, indeed, can the Banks credibly argue — and they do not — that T & N's implied request for forbearance with regard to the Banks was beyond T & N's authority as derived from Andina. It was a critical element of Andina's contractual obligation to the Banks to provide for them — and itself — unbroken insurance coverage. Preventing cancellation absent substitute coverage was integral to the obligation to obtain insurance in the first place.

It is also clear that when, on February 25, 1986, T & N agreed with Affiliated and the London insurers that the Affiliated Policy would be terminated as of that date and replaced by the London Policy, T & N was acting on behalf of and within the scope of authority conferred on it by Andina. Accordingly, the Affiliated Policy was terminated

as to Andina on February 25, 1986, notwithstanding Andina's right under the Policy to 90 days' notice of cancellation.

The factual statements in the above discussion are fully consistent with the findings of the district court. There is one finding of the court, however, that we hold to be clearly erroneous.[11] Finding No. 66 states that "[t]here is no evidence that T & N purported to cancel the Affiliated Policy [on February 25, 1986] on behalf of any Bank." To the extent that this finding suggests that T & N did not intend to terminate the Policy as to the Banks on February 25, 1986, it is simply wrong. The cancellation was not at T & N's instance but at Affiliated's. Affiliated had communicated its desire to T & N to cancel the entire Policy, which covered both Andina and the Banks. Neither Affiliated, Andina, nor T & N ever suggested that the cancellation would not end all coverage of all insureds. Because the coverage was for the same risks arising out of the same transactions, a partial cancellation would have made no commercial sense. Moreover, all parties understood that no premia would be paid to cover Andina or the Banks for the period from February 25 on. Indeed, the April Agreement was executed to allocate risks with that date in mind. Finally, T & N obtained substitute coverage for the Banks from the London insurers effective on that date, an act confirming T & N's intent to terminate Affiliated's coverage of the Banks.

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11. Because we decide this case upon ratification grounds, we need not hold Finding No. 67 to be clearly erroneous and thus do not reach that issue. We need not hold Finding No. 26 to be clearly erroneous because that portion thereof that addresses the date of cancellation of the Affiliated Policy is not a finding of fact but a conclusion of law.

Appendix B

We turn then to the core of the case, namely, whether the February 25 termination was effective as to the Banks and whether the April Agreement binds the Banks.[12] We hold for Affiliated on both issues.

Affiliated advances a strong argument that we should simply dispose of both issues under the doctrine of apparent authority. The Banks authorized Andina to procure and pay for insurance on their behalf. *See Doxsee Sea Clam Co. v. Brown*, 13 F.3d 550, 553 (2d Cir. 1994) ("An agent has apparent authority when conduct by the principal leads a third party to believe that the agent has authorization to act on behalf of the principal."). The Banks never communicated to Affiliated any limitations on that authority. When

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12. Parties may of course waive notice of cancellation requirements in an insurance policy. Generally, where a party wishes to terminate an insurance policy before its expiration, the party must strictly follow the cancellation terms of that policy. *See Providence Washington Ins. Co. v. Security Mut. Ins. Co.*, 324 N.E.2d 134, 136 (N.Y. 1974) (per curiam); *National Factors, Inc. v. Waters*, 249 N.Y.S.2d 121, 127 (Sup. Ct. 1964). It is settled under New York law, however, that the parties can agree to waive terms of the policy, including the terms governing notice of cancellation. *See, e.g., Sass v. Ocasio*, 399 N.Y.S.2d 122, 123 (App. Div. 1977); *see also* 2 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* § 31:52 (1997). In the instant matter, T & N and Affiliated agreed to waive the notice provisions and there is no dispute that Andina gave T & N the express authority to replace the Affiliated Policy with the London Policy. This authority included the power to waive Andina's contractual right to 90 days' notice. *See, e.g., Dudley v. Perkins*, 139 N.E. 570, 572 (N.Y. 1923) (grant of authority necessarily encompasses all acts "ordinarily incidental to the exercise" of the authority); *see also Rose Inn Corp. v. National Union Fire Ins. Co.*, 179 N.E. 256, 256 (N.Y. 1932).

Affiliated wanted to terminate the Policy, T & N asked on Andina's behalf that Affiliated withdraw its notice of cancellation. That request was reasonably understood to include a request for forbearance by Affiliated regarding coverage of the Banks. In return, Andina and T & N promised to obtain substitute insurance as quickly as possible and to inform Affiliated of the effective date of the new insurance. Affiliated's forbearance as to the Banks involved a sacrifice of a legal right because it could have terminated their coverage at any time on only 10 days' notice. *See Monarch Ins. Co. v. Insurance Co. of Ireland Ltd.*, 835 F.2d 32, 36 (2d Cir. 1987). When T & N informed Affiliated that a new policy was effective immediately on February 25, 1986, Affiliated reasonably believed that Andina had fulfilled its contractual obligations to the Banks and was acting within its authority in terminating the Affiliated Policy on that day.

We dispose of the case on slightly narrower but stronger grounds, however. The Banks clearly ratified the February 25th termination. That ratification in turn, along with all other conduct, renders the April Agreement binding on the Banks under the doctrine of apparent authority.

Under New York law, ratification is the affirmance by a party of a prior act that did not bind it at the time but that was done or purportedly done on its account. *See J.M. Heinike Assocs., Inc. v. Chili Lumber Co.*, 443 N.Y.S.2d 512, 513 (App. Div. 1981); *Leviten v. Bickley, Mandeville & Wimple, Inc.*, 35 F.2d 825, 827 (2d Cir. 1929); *Restatement (Second) of Agency* § 82 (1958). Ratification "must be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established

and may not be inferred from doubtful or equivocal acts or language." *Holm v. C.M.P. Sheet Metal, Inc.*, 455 N.Y.S.2d 429, 432 (App. Div. 1982); *accord Restatement (Second) of Agency* §§ 91, 93. However, "[t]he intent can be 'implied from knowledge of the principal coupled with a failure to timely repudiate, where the party seeking a finding of ratification has in some way relied upon the principal's silence or where the effect of the contract depends upon future events.' " *Monarch Ins. Co.*, 835 F.2d at 36 (quoting *Julien J. Studley, Inc. v. Gulf Oil Corp.*, 282 F. Supp. 748, 752 (S.D.N.Y. 1968), *rev'd on other grounds*, 407 F.2d 521 (2d Cir. 1969)). A ratified act is given effect as if originally authorized. *See Holm*, 455 N.Y.S.2d at 432.

The Banks received notice on March 11, 1986, that the Affiliated Policy had been terminated on February 25, 1986. Although this notice would surely have caught the attention of any insured who needed prior warning — and prompted a swift protest — the Banks never objected to or questioned the validity of the termination, at least until they discovered years later that it was in their litigation interests to do so. Under the circumstances, the Banks' silence in the face of this cancellation notice amounted to an implied affirmance of the cancellation on February 25, 1986. *See Restatement (Second) of Agency* § 94 (affirmance can be inferred from failure to repudiate unauthorized transaction); *see also J.M. Heinike Assocs., Inc.*, 443 N.Y.S.2d at 513 ("[A]ffirmance may be inferred from silence when, in the normal course of affairs, one who does not wish to consent would speak out."); *American Anchor & Chain Corp. v. United States*, 331 F.2d 860, 865 (Ct. Cl. 1964) (principal ratified act of purported agent by failing to repudiate); *cf. Carter v. Allstate Indem.*

Co., 592 So. 2d 66, 71-73 (Miss. 1991) (even though insurer did not provide mortgagee with 10 days' notice of cancellation, mortgagee estopped from making claim against insurer because mortgagee acquiesced in placement of substitute insurance with another insurer); *Julien J. Studley, Inc.*, 282 F. Supp. at 752 (principal may be estopped to deny ratification where he fails to timely repudiate and other party performs in reliance); Harold Gill Reuschlein & William A. Gregory, *The Law of Agency and Partnership* § 37 (2d ed. 1990) (principal who fails to repudiate and retains benefits of Agreement estopped to deny ratification).

We do not stretch logic in so concluding. When the Banks received the March 11, 1986 notice, their sole interest in these transactions was in unbroken insurance coverage. Indeed, the 10 days' notice provision was obviously intended to protect the Banks from a gap in coverage should Andina fail in its contractual obligations to maintain insurance. With substitute insurance in place, the Banks had no reason to question the termination. In fact, in their state-court complaints, the Banks acknowledged that the Affiliated Policy terminated on February 25, 1986. Further, the Banks (save NatWest) never submitted to Affiliated proofs of loss for shipments occurring after February 25, 1986, until March 1989.

Relying on Finding No. 66, the district court held that any affirmance of T & N's acts did not amount to ratification because T & N, in cancelling and replacing the Affiliated Policy, did not do so with respect to the Banks. In its view, "there was no unauthorized act which could be the subject of a subsequent ratification by any Bank." 970 F. Supp. at 330. However, for reasons set out at length above, Andina

and T & N both intended that coverage of the Banks under the Affiliated Policy would cease when the London Policy became effective.

The Banks also contend that they could not have effectively ratified the cancellation of the Affiliated Policy because they were unaware of two material facts — that losses had occurred shortly after the cancellation and that the London insurers would later claim that the London Policy was void. We disagree. Such facts are not material.

The fact of prior losses was not, under the circumstances, material. T & N cancelled the Affiliated Policy but simultaneously replaced it with a policy with identical coverage. Therefore, even if the Banks had known that losses had occurred after the cancellation but before the subsequent ratification, the Banks would have had every reason to believe that they were covered under the London Policy, and knowledge of the losses would not have affected their decision whether to ratify the replacement.

The actions of the London insurers in claiming that the London Policy was void were also not material for purposes of ratification doctrine. The future actions of an insurer are not facts of which a party can be informed when deciding whether to acquiesce in the early cancellation of another policy. There is always a risk that an insurer will refuse to honor a future claim. However, whether conduct amounts to ratification depends on circumstances at the time of the conduct, not the *ex post* actions of a substitute insurer. Otherwise, a ratification would be effective only when things turned out well for the principal, a circumstance in which the ratification would be irrelevant.

Appendix B

With regard to the April Agreement, the Banks did not receive notice of it, and the doctrine of ratification cannot apply. However, we believe that T & N had apparent authority to enter into it. Apparent authority is generally defined as "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." *Restatement (Second) of Agency* § 8. "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction." *Ben-Reuven v. Kidder, Peabody & Co.*, 661 N.Y.S.2d 28, 29 (App. Div. 1997) (quoting *Standard Funding Corp. v. Lewitt*, 678 N.E.2d 874, 877 (N.Y. 1997)); *accord Doxsee Sea Clam Co.*, 13 F.3d at 553-54. The existence of apparent authority depends on some conduct by the principal "which reasonably give[s] the appearance that the agent has authority to conduct a particular transaction." *Doxsee Sea Clam Co.*, 13 F.3d at 554 (citing *Greene v. Hellman*, 412 N.E.2d 1301 (N.Y. 1980)); *accord Hallock v. State*, 474 N.E.2d 1178, 1181 (N.Y. 1984). Where a third party reasonably relies on such acts, the principal may be bound by the conduct of his agent. *Doxsee Sea Clam Co.*, 13 F.3d at 554.

To be sure, the Banks never communicated directly with Affiliated. However, under New York law, apparent authority does not require actual contact between the principal, here the Banks, and the third party, here Affiliated. *See General Motors Acceptance Corp. v. Finnegan*, 592 N.Y.S.2d 570, 572 (Sup. Ct. 1992). Rather, it requires the third party only

to demonstrate some manifestation attributable to the principal. Were the law otherwise, the benefits of the doctrine of apparent authority would be severely diminished because a lack of contact between the principal and third party often leaves the third party with little choice but to deal with the purported agent.

The manifestation giving rise to T & N's apparent authority in the instant matter arises from the facts that: (i) the Banks allowed T & N (through Andina) to set the terms of their initial inclusion as additional insureds to the Affiliated Policy; (ii) the Banks for years ceded to T & N the power to maintain that Policy and, save for the endorsement, never indicated to Affiliated that T & N's authority was limited; indeed, they never communicated with Affiliated concerning the Policy; and (iii) the Banks, as discussed above, ratified by their silence the cancellation and replacement of the Affiliated Policy, indicating that the Banks' sole interest was in the maintaining of unbroken coverage and necessitating the clarification of risk allocation and premia division that the April Agreement represented.

Based on these facts, it was reasonable as a matter of law for Affiliated to believe that, where the substitution of a new policy created ambiguity over the matching of liability for premia and allocation of risk, T & N had the authority on behalf of the Banks to enter into an agreement drawing a bright line even if some reallocation of the risks between the Affiliated and London Policies was involved. *See, e.g.*, *Fitzgibbon v. Abatelli Real Estate*, 625 N.Y.S.2d 276, 277 (App. Div. 1995) (apparent authority is outgrowth of equitable principle that, as between two innocent persons, person who enabled the injury to occur should bear loss);

see also Hallock, 474 N.E.2d at 1182 (attorney had, as a matter of law, apparent authority to enter into settlement where he had represented client in prior settlement negotiations and appeared at final pretrial conference where settlement was reached); *cf. Jones v. Nunley*, 547 P.2d 616, 618 (Or. 1976) (purported agent did not have apparent authority where principal, not agent, had engaged in prior negotiations with third party).

The April Agreement merely allocated risks between two insurance policies that T & N had undeniable authority to purchase. The Agreement did not result in a break or reduction or coverage of the Banks, and it would have seemed to a reasonable person at the time to have been very much in the Banks' interests to have the allocation of risk clarified lest a dispute between insurers retard or prevent recovery for claims. It is only in the hindsight of this litigation with its unique facts that we know otherwise.

We expressly note that this case is entirely distinguishable from one where, in similar circumstances, an apparent agent and third party agree to cancel the principal's interest in a policy without providing the required notice or substitute insurance. It surely would have been unreasonable for Affiliated to assume that T & N could waive the 10-day notice period without engaging another insurer. *See Van Arsdale v. Metropolitan Title Guar. Co.*, 425 N.Y.S.2d 482, 484 (Dist. Ct. 1980).

CONCLUSION

The judgment of the district court is reversed with instructions to enter judgment for Affiliated.

APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED JULY 18, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

87 Civ. 0150 (MP)
87 Civ. 0151 (MP)
87 Civ. 0153 (MP)
87 Civ. 1537 (MP)
87 Civ. 1538 (MP)
87 Civ. 4524 (MP)
87 Civ. 0835 (MP)

CHEMICAL BANK,

Plaintiff,

– against –

AFFILIATED FM INSURANCE CO.,

Defendant.

* * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

OPINION AND FINDINGS

This action was tried at a Bench Trial before the Honorable Milton Pollack, United States Senior District

Judge, without a jury on May 12, 1997, May 13, 1997, May 14, 1997, May 15, 1997, May 16, 1997, May 19, 1997, May 20, 1997, May 22, 1997, May 23, 1997, May 27, 1997, May 28, 1997, May 29, 1997, May 30, 1997, June 2, 1997 and June 3, 1997; and this Court having heard and seen the witnesses, and having received and ruled on the exhibits proffered by the parties and having received deposition designations of the parties at hearings held on June 4, 1997 and June 5, 1997; and this Court having evaluated the testimony of witnesses, and having considered the documents received in evidence, and having reviewed the depositions, in whole or in part, as designated by the parties, and due deliberation having been had, reports the same in its Opinion and Findings and expresses its Conclusions, as follows.

This decade-old insurance policy dispute stems from the fraud perpetrated by a Colombian coffee exporter, Gonchecol Ltda. ("Gonchecol"), against a United States importer ("Andina")[1] and six financing banks (the "Banks"),[2] which caused losses in 1986 totalling over $94,500,000. Gonchecol presented fraudulent truck bills of lading as draw documents

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1. The coffee importer is Andina Coffee, Inc. and its subsidiary, Andina Trading Corp. (collectively "Andina").

2. The plaintiffs are: Chemical Bank (now known as The Chase Manhattan Bank) ("Chemical"); Banque Paribas ("Paribas"); American Express Bank Ltd. (formerly known as American Express International Banking Corporation) ("American Express Bank" or "Amex"); NatWest Bank N.A. (now known as Fleet Bank, N.A.) ("NatWest"); Cooperative Centrale Raffeisenboerenleenbank B.A. ("Rabobank"); European American Bank ("EAB") (collectively the "Banks"); and the plaintiff Andina.

in order to obtain payment on letters of credit provided by the Banks to their customer Andina. At the outset of these consolidated actions, the Banks and Andina brought claims against two insurance companies — Affiliated FM Insurance Company ("Affiliated") and Lloyd's of London ("Lloyd's" or the "London Insurers") — to recover under open cargo marine insurance policies and against two insurance brokers — Trinder & Norwood and Hogg Robinson Ltd. and Hogg Robinson & Gardner Mountain Ltd. By 1993, all the defendants except for Affiliated negotiated settlements with the Banks. In this action, the Banks seek to recover $44,174,000 together with pre-judgment interest from January 1, 1987 arising under forty-eight letters of credit drawn or paid prior to March 21, 1986.

Plaintiffs base jurisdiction under 28 U.S.C. § 1332. Defendant Affiliated is a citizen of Rhode Island. Each of the plaintiffs, at the commencement of the actions, was a citizen of a state other than Rhode Island or a nation other than the United States and had its principal place of business in New York.

The unique commercial context and drawn-out prelitigation history is as follows.

I. The Parties and Their Commercial Dealings

The Echeverris, Colombian nationals, owned and controlled Gonchecol and other coffee businesses in Colombia. These businesses — Gonchecol, Goncheverri and Gonchelopez (collectively the "Gonche Group") — exported sizable quantities of coffee to the United States, Europe, and

Japan during the 1970s and 1980s up until the fraud.[3] The Gonche Group represented one of two of the largest private exporters of coffee in Colombia.[4] Julian Echeverri directed the Echeverri family enterprises; his nephew, Ruben Echeverri ("Ruben" or "Echeverri"), ran the day-to-day operations of Gonchecol. Bank files on Andina reveal that the Gonche Group also held large interests in banking,[5] textiles, cattle ranching and other industrial enterprises and its owners were well connected in Colombia.[6] The Banks believed the Echeverri family to be a leading family in Colombia, and well regarded in the political and business community.[7]

In 1974, the Echeverris, along with several other Colombian coffee-exporting families, established Andina Coffee, Inc. in New York, New York[8] to serve as its agent and to facilitate the importation of coffee into the United States. Subsequently, in order to minimize the exporters' taxable income in the United States, the ownership of Andina's stock shifted from the founding individual

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3. *See* Ocampo, Plaintiffs' Deposition Designations, at 1235; *see also* Sahyoun, Defendant's Deposition Designations, at 130 (referring to sales to Europe by Andina).

4. Tr. at 21 (Gleason testimony); Pls.'s Ex. CH 39.

5. Pls.'s Ex. 43 at 305275.

6. Pls.'s Ex. 41 at 703029.

7. Pls.'s Ex. 43 at 305278.

8. Canal, Plaintiffs' Deposition Designations, at 16.

shareholders to three Panamanian corporations, in which the Echeverris held a minority share.[9] In 1983, Andina Coffee, Inc. formed Andina Trading Corporation as a wholly-owned subsidiary. Andina Coffee derived its income from commissions on the sale of coffee and from financing charges imposed on the exporters. Andina Trading Corporation derived its income from profits in the sale of coffee.[10]

At the time of the discovery of the fraud in 1986, Andina was the largest importer of Colombian coffee into the United States and enjoyed a strong reputation in terms of delivery, quality, and reliability.[11] Humberto Canal and Dennis Kessler managed Andina: Canal served as the chief operating officer;[12] Kessler served as its chief financial officer.[13] Based on between five and ten years of profitable collaborative experience, which was described as "increasingly close and open," the Banks knew Andina's management well and regarded them highly.[14] Canal

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9. Tr. at 1012 (Kessler testimony); Echeverri deposition, at 602 (stating that due to tax matters and upon the recommendation or advise of Kessler and Canal, the Echeverris decreased their shares to own less than fifty percent of the Panamanian companies).

10. Tr. at 1007 (Kessler testimony).

11. Tr. at 295 (Nead testimony).

12. Canal, Plaintiffs' Deposition Designations, at 16-17.

13. Tr. at 1006 (Kessler testimony).

14. *See, e.g.*, Pls.'s Ex. 43 at Z112061 (describing the relationship between Chemical Bank and Andina as "increasingly

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and Kessler enjoyed over a long time solid reputations in the industry as reliable, respected and trustworthy merchants.[15] Julian Echeverri, Ruben Echeverri and Hernan Lopez — all original individual owners of Andina — at various times, also served as officers of Andina[16] and members of the board of directors.[17]

After Gonchecol contracted for a sale of coffee to roasters in the United States,[18] Andina provided the Gonche

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close and open"); Pls.'s Ex. 49-8 at C005393-94, C005398 (describing officers' impressions at Paribas, NatWest, and Chemical Bank that their respective banks held Andina's senior management in high regard, and concluding that American Express likewise held Andina's senior management in high regard).

15. Pls.'s Ex. 43 at 305278.

16. Tr. at 1015-16 (Kessler testimony) (noting that these officers did not engage in Andina's day-to-day operations but rather provided consulting and advisory services in Colombia regarding the coffee market).

17. Kessler testified that the principals of the Colombian exporters never constituted a majority of Andina's board of directors. Tr. at 1012-13.

18. The typical transaction underlying the commercial relationship between the Banks, Andina, and Gonchecol was as follows. Gonchecol would contract for a sale of coffee with a United States roaster. Gonchecol would then request that Andina arrange for a documentary letter of credit to be opened in its favor. The letter of credit was payable on presentation of inland documents
(Cont'd)

Appendix C

(Cont'd)
consigned to one of the Banks. Once the Bank opened the letter of credit, Gonchecol would register the sale of coffee with the Central Bank of Colombia and the National Federation of Coffee Growers of Colombia (the "Federation"). The letter of credit evidenced the importation of dollars and served as a prerequisite for a license to export. Gonchecol would then purchase the coffee, which would be transported to one of its mills for processing. The Federation would inspect the coffee and, if approved, issue a document called the "Revision," which specified the quantity of coffee and assigned a lot number. Gonchecol would then arrange for the coffee to be shipped from the mill to the port. The trucker would issue a truck bill of lading, which would in turn be presented to the advising bank, and the letter of credit would be drawn upon. Andina would then incur a loan chargeable against its line of credit with the Bank, and would begin charging interest to Gonchecol. The trucker would transport the coffee from the interior to the port for shipment, usually in convoys and with military escort. Once at the port, the Federation would inspect the coffee again and the coffee would be consigned to the port forwarder for shipment to the United States. The Bank would hold the interior documents as collateral for the loan (usually with a maximum tenor of between 45 and 60 days) until receipt of the ocean bills of lading. Upon issuance of the ocean bills of lading, Gonchecol would courier the bills of lading to Andina in New York, Andina would present the bills to the Bank for endorsement, and the Bank would release the document to Andina on trust receipt (usually for a maximum of 60 days). Andina would then arrange for the coffee to clear customs, and would present the coffee to its customer. Once the roaster took possession of the coffee and made payment, Andina would repay its corresponding portion of the loan. Pls.'s Ex. Ch 43 at 305276; *see also* Pls.'s Ex. Ch. 4 Exhibit A.

The mechanics of the letter of credit transaction were as follows. Upon request from Gonchecol, Andina would contact the Bank's account officer to apply for a letter of credit. The account officer

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Appendix C

Group with financing for the export of coffee from Colombia through documentary letters of credit charged against secured lines of credit established with various United States and European banks.[19] The letters of credit at issue in this case provided that the Colombian exporter, as beneficiary, could obtain payment from a Bank by presenting the following draw documents: a railroad or truck bill of lading; a

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would check Andina's line of credit. If adequate, Andina would submit a letter of credit application to the Bank's letter of credit department. Upon receipt of such applications, the letter of credit department would examine the application, for information such as the corresponding or advising bank and relevant dates. Once the letter of credit department completed its review of the application, it would obtain credit approval from the account officer. The letter of credit would then be telexed to the advising bank in Colombia. Tr. at 560-61 (Blanc testimony).

The payment of letters of credit on behalf of Andina required the advising Colombian banks to forward the draw documents to the letter of credit department of the financing Bank. The letters of credit called for draw documents consisting of a railroad or truck bill of lading, a commercial invoice, and a letter to the port forwarder requesting the preparation of an ocean bill of lading to the order of the financing bank. The letter of credit department would inspect the draw documents for compliance with the letter of credit. The department would prepare a document called a turn- down that listed any discrepancies noted, and if any were noted the Bank would contact Andina and inquire whether Andina waived the discrepancies. Upon Andina's waiver, the Bank would accept the documents and make payment to the Colombian bank. Tr. at 562-63 (Blanc testimony).

19. Tr. at 1016 (Kessler's testimony).

commercial invoice; and a letter to the port forwarder requesting the preparation of an ocean bill of lading to the order of the financing bank. Correspondent Colombian banks forwarded the draw documents to the financing banks, which in turn advanced the funds. As a general rule, Andina did not receive copies of the truck bills of lading or other draw documents.[20] This mode of transactional financing enabled Andina to finance the purchase of specified lots of coffee and to repay the letters of credit with the proceeds of the sales of coffee.[21]

Through this asset conversion cycle plaintiff Banks extended hundreds of millions of dollars of credit to Andina, all of which was timely repaid prior to 1986.[22] Up until the discovery of the fraud, Andina proved a reliable and profitable customer of the Banks. Canal and Kessler maintained good relations with the Banks' officers. The Banks' officers maintained in-depth files on Andina and kept abreast of industry developments. While some of the Banks endeavored to improve upon the security underlying the transactional financing — especially in light of the uncommon challenges posed by conducting business in Colombia during the 1980s — on the whole, Andina had established an excellent track record of credit trustworthiness and profitability.

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20. Tr. at 1017 (Kessler testimony); Canal, Affiliated's Supplemental and Counter Deposition Designations, at 571.

21. Bazin, Affiliated's Supplemental and Counter Deposition Designation, at 10.

22. Tr. at 894 (Oster testimony); tr. at 1019 (Kessler testimony).

Andina, for its part, profited from its commercial arrangements. Gonchecol had kept up with their shipment obligations. Canal, Andina's president, testified (by deposition) that prior to 1986 Andina did not need to interfere in the manner in which the Gonche Group transported coffee from the warehouses to the ports because they had exported over the years between 13 to 14 million bags without incident. These volumes both impressed and pleased Andina's management.[23] Canal expected Andina to make sizable profits in 1986;[24] and, some of the Banks noted Gonchecol's profitable operations through the first quarter of 1986. In addition, Andina's minutes of its board meetings in September, 1985 and May, 1986 indicate that the Gonche Group hoped to increase its monthly exports to over 130,000 bags, and that Kessler sought additional lines of credit with other banks to augment Andina's available credit to at least $250 million.[25]

II. The Insurance Policy

As a condition of financing, the Banks routinely obtained through Andina suitable insurance against false draw

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23. Canal, Plaintiffs' Deposition Designations, at 950.

24. Canal, Plaintiffs' Deposition Designations, at 1375 (stating that the Gonche Group had been exporting amounts of coffee that corresponded to the credit advanced and that Andina was making a good profit in 1986 prior to the discovery of the fraud).

25. Pls.'s Ex. AND 163-2 at 5; Pls.'s Ex. AND 163-23 at 6 (Andina's board minutes of September 23, 1986) (referring to Kessler's efforts to negotiate lines of credit with additional banks).

documents. Andina obtained a marine open cargo insurance policy issued by Affiliated (the "Affiliated Policy" or "Policy") on July 23, 1980. Each of the Banks was named in the Affiliated Policy as an additional assured as evidenced by separate Banker's Endorsements. The Affiliated Policy expressly extended coverage to losses caused by fraudulent bills of lading, shipping receipts or messenger receipts.[26] In addition, each of the Banker's Endorsements, in relevant part, stated: (1) that the Bank's interest would not be impaired or invalidated by an act or neglect or breach of warranty of Andina; (2) that the Bank must receive 10 days prior written notice of any cancellation; and, (3) that "the policy does not insure against conversion, misappropriation or other dishonest acts committed by or on behalf of the named Assured."[27]

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26. Affiliated Policy's Clause 37(D) provided that:

> This policy covers loss or damage occasioned through the acceptance by the Assured and/or their agents or shippers of fraudulent Bills of Lading and/or shipping receipts and/or messenger receipts.

27. Each of the Banker's Endorsements provided the following:

> This insurance, as to the interest of the Bank, shall not be impaired nor invalidated by any act or neglect of the named Assured nor by failure to comply with any warranty or condition over which the Bank has no control; and this policy shall not be cancelled nor materially changed as to the interest of the Bank unless 10 days' (in case of war risks coverage only, 48 hours') prior written notice of such change or cancellation shall have been given to the Bank.

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Appendix C

Affiliated did not deal directly with Andina, but rather dealt with Trinder & Norwood, an insurance broker.[28] In the summer of 1985, Affiliated decided to cancel the Affiliated Policy because the Andina account had proven to be unprofitable and contacted Trinder & Norwood about replacing it with another policy. In the fall of 1985, the manager of Affiliated's marine cargo department, David Pemmerl, called Trinder & Norwood to inform them of Affiliated's intention to cancel the policy. Shortly thereafter, on November 27, 1985, Pemmerl sent notice of cancellation for the insurance policy effective March 1, 1986.[29] Pemmerl did not send a copy of the letter to Andina or to any of the Banks.[30] Because Trinder & Norwood feared marketing the Andina account under a notice of cancellation, it asked and Affiliated agreed to rescind the cancellation, and Trinder & Norwood assured Affiliated that it would seek a replacement policy as soon as possible.[31] On February 25, 1986, Pemmerl received a telex from Trinder & Norwood notifying Affiliated that a second insurance policy with Lloyd's of London was

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> This agreement shall not extend the said policy to cover any additional risks, it being especially agreed that the policy does not insure against conversion, misappropriation or other dishonest acts committed by or on behalf of the named Assured.

28. Tr. at 1489 (Pemmerl testimony).

29. Tr. at 1499 (Pemmerl testimony).

30. Tr. at 1500 (Pemmerl testimony).

31. Tr. at 1501 (Pemmerl testimony).

placed with their underwriters and became effective as to all shipments made on and/or beginning on and/or after February 25, 1986.[32] Affiliated, however, did not send notice of cancellation to the Banks until March 11, 1986, and under the 10-day prior written notification of cancellation requirement the Affiliated Policy was not cancelled until March 21, 1986.

III. The Discovery of the Fraud

During the 1980s, among other business endeavors, the Gonche Group constructed a large office building in Cali, Colombia called the Cali Tower. The Cali Tower proved to be an unsuccessful business venture and a financial drain for the Gonche Group.[33] In addition, the Gonche Group looted Gonchecol to cover debts incurred by Goncheverri and Gonchelopez, and Goncheverri's director speculated in coffee futures on the commodities market and thus incurred further debts.[34] Over time, Gonchecol's financial situation grew dire as debts mounted.

Nonetheless, as noted above, throughout 1985 and into 1986, the Gonche Group sustained a steady rate of coffee

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32. Tr. at 1509-10 (Pemmerl testimony); Jensen, Defendant's Deposition Designation, at 376.

33. Echeverri, at 211-22 (deposition testimony).

34. Pls.'s Ex. Echv 60 at 1 (Echeverri post-arrest statement dated November 16, 1995); Pls.'s Ex. Echv 58 ¶ 14 (Echeverri post-arrest statement dated October 26, 1995); Pls.'s Ex. Echv 59 ¶¶ 3-4 (Echeverri post-arrest statement dated November 17, 1995).

exports, and kept up with its asset conversion cycle.[35] In the winter of 1985, Ruben Echeverri requested that Andina increase the amount of available financing in order to augment the exports of coffee.[36] Andina's management imposed as conditions of their securing additional lines of credit that the Gonche Group increase their working capital and that they shorten the asset conversion cycle.

In April, 1986, Canal travelled to Colombia to assist the Echeverris in increasing their working capital. During this trip, Canal discovered that the Gonche Group faced a cash flow liquidity problem, which he attributed to several factors — each of which compounded the other. First, the Colombian peso had undergone a substantial devaluation. Second, the Echeverris had taken out significant loans in dollars, which they were forced to repay with devalued pesos at high exchange rates. Finally, a shift in tax policy, which required exporters to pay an export tax with increasingly greater cash contributions rather than in-kind payments and which moved up the time of payment from the port to the mill, further exacerbated the Gonche Group's cash flow liquidity problem.[37] The Echeverris informed Canal that the requirement to pay ever-increasing portions of the tax in cash — and the Gonche Group's liquidity crisis — were causing delays in the anticipated deliveries of coffee.

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35. Canal, Affiliated's Supplemental and Counter Deposition Designations, at 130.

36. Tr. at 1019 (Kessler testimony).

37. Pls.'s Ex. AND 163-2 (minutes of Andina's board of directors meeting held on May 19, 1986); Pls.'s Ex. AND 163-3; tr. at 1022 (Kessler testimony).

Appendix C

Andina held a board of director's meeting on May 19, 1986, at which time Canal discussed the Gonche Group's cash flow liquidity problem and the resulting delays in coffee shipments. Canal assured the Board that the situation in Colombia did not jeopardize Andina's collateral position, and that he believed the liquidity problem to be temporarily resolvable. Canal outlined a plan of the Gonche Group to sell $30 million in hard assets in order to infuse Andina with working capital and to shorten the asset conversion cycle. At the meeting, Ruben Echeverri, a senior executive of Gonchecol and a director of Andina, stated that even if the Banks suspended all the lines of credit, the Gonche Group would nonetheless export all financed coffee. Ruben Echeverri further noted that he had signed a subordination agreement covering all amounts due Gonchecol as unrepatriated earnings.

At this point, Kessler did not notify the Banks that the Gonche Group faced a cash flow liquidity problem. Ruben Echeverri had personally assured the Andina management that the Gonche Group could and would deliver the financed coffee. Because the exporters had always complied with past promises, had met their obligations in a timely fashion, had sustained the necessary export volumes, and had substantial wealth and assets in Colombia, Canal and Kessler trusted that the exporters would resolve the liquidity crunch that they faced.[38]

In late May or early June, 1986, Andina noticed a marked elongation in the cycle with increased delays in the

38. Tr. at 1023, 1307 (Kessler testimony).

exportation of coffee and repayment of letters of credit. In June and July, Gonchecol's shipments began to lag appreciably,[39] and the exporters requested on at least two occasions that Andina send funds to Colombia. Canal and Kessler declined to do so.[40] Relations between the Gonche Group and Andina's management became strained. Nonetheless, in order to maintain Andina's economic viability, when the exporters asked Andina to request 60-day extensions of payment of Andina's letters of credit coming due, Andina complied. Starting in early July, Andina began to contact and meet with individual financing Banks to discuss the liquidity crunch and to request additional short-term financing, which request at least one Bank granted.[41] [42] Chemical Bank, with whom Andina had the largest line of credit, refused Andina's request because its management found the exporters' explanations inadequate. Chemical Bank informed Andina that it needed greater details regarding the changes in the taxes before it would extend credit.[43] Shortly thereafter, the Banks and Andina were quickly overtaken by events.

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39. Canal, Affiliated's Supplemental and Counter Deposition Designations, at 946-47.

40. Tr. at 1024 (Kessler testimony).

41. Tr. at 15 (Gleason testimony); Tr. at 164 (Nead testimony).

42. Andina's management held a series of meetings in July with the financing Banks.

43. Tr. at 15 (Gleason testimony).

Appendix C

The Gonche Group failed to sell any hard assets to raise working capital for Andina as promised by Ruben Echeverri at the Andina board meeting of May 19, 1986.[44] As the situation deteriorated, the Banks' officials conferred with one another and confirmed that Andina's loans were due with all the financing institutions. On August 12, 1986, Robert Nead ("Nead"), an American Express bank official, joined Canal in Colombia to investigate the situation.[45] On August 14, 1986, Kessler arranged a meeting of the Banks in New York to discuss potential solutions to the liquidity problem.[46] At the same time, Nead and Canal arranged to meet Ruben Echeverri at Gonchecol's offices in Bogota. At the Bogota meeting, Ruben Echeverri stated that he was in financial difficulty with the Colombian banks, that he had pledged coffee to them, and that approximately 200,000 bags of coffee financed by the Banks was missing.[47] Ruben Echeverri further stated that because he was in a liquidity crisis and needed money, he had drawn against letters of credit with false documents.[48] Ruben Echeverri's admissions infuriated

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44. Tr. at 1023 (Kessler testimony).

45. Tr. at 167 (Nead testimony).

46. Tr. at 1026 (Kessler testimony).

47. Tr. at 170 (Nead testimony).

48. Tr. at 170-71 (Nead testified that when he asked Ruben Echeverri how the coffee could be missing Ruben stated "that because [Ruben] was in a liquidity crisis and needed the money, that he drew against bills of lading with . . . false documents").

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Canal.[49] Immediately thereafter, Canal and Nead placed two separate conference calls to the Banks' group meeting in New York at which time they informed the group of Ruben Echeverri's admissions. The attendees, including Kessler, responded to the news of the missing coffee and the fraudulent draw documents with shock and surprise.

At the August 14, 1986 meeting, the Banks decided to send a representative group to Colombia to investigate the situation and determine what steps the Banks could take to identify and secure their collateral. The Banks met in Bogota on August 19, 1986 at a meeting attended by Ruben Echeverri, another employee from Gonchecol, eleven representatives from the financing Banks, and attorneys from two of the Banks' local Colombian counsel. Subsequently, Ruben indicated that twenty people were present. Canal did not attend. In the presence of this large group, Echeverri offered the same explanation for the missing coffee that he had given at the first meeting: he stated that he was in a liquidity crisis due to other business ventures, foreign exchange losses and illiquid investments.[50] Echeverri elaborated that he had borrowed money from Colombian banks, that they sought repayment, and that he presented false

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Nead's testimony corroborates Garcia's account of Ruben's explanation for the causes of the crisis immediately after the discovery of the fraud. *See* Garcia, Plaintiffs' Deposition Designations, at 89.

49. Tr. at 171 (Nead testimony).

50. Tr. at 177 (Nead testimony).

truck bills of lading (through a trucking company called Enaltra, which he had previously bought) to draw on letters of credit.[51] At this August 19, 1986 meeting, Nead specifically asked Echeverri whether Andina was aware of the fraudulent draw documents. Echeverri responded that Andina was not aware and complained that Andina was causing him discomfort by pressuring him to deliver coffee, exacerbating his financial difficulties, and risking a financial scandal.[52] Canal later expressed anger at being excluded from attending this meeting.[53]

In the events leading up to and after the discovery of the fraud, Andina broke completely from the Gonche Group. In addition to refusing to send further funds to the Gonche Group, subsequent to the discovery of the fraud, Andina placed its liquid assets into an escrow account for the benefit of the Banks. Further, after August, 1986 and on the advice of its counsel, Andina's personnel ceased all direct communications with the Echeverris.

A preponderance of the credible evidence shows that at the very least Echeverri began to present fraudulent draw documents upon becoming financially strapped and desperate and that Andina's management neither knew nor participated in the fraud. Echeverri offered consistent explanations at the August 14, and August 19, 1986 meetings for the cause of

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51. Tr. at 178 (Nead testimony).

52. Tr. at 179 (Nead testimony).

53. Tr. at 180 (Nead testimony).

the missing coffee — specifically, the Gonche Group's financial difficulties and Gonchecol's subsequent presentation of fraudulent truck bills of lading. At the latter meeting, in the presence of twenty witnesses, Echeverri not only unqualifiedly exonerated Andina of any wrongdoing but expressed irritation at Andina for "exacerbating" his difficulties. Eyewitness testimony of Canal's reaction to both Echeverri's confession of the fraud and to his exclusion from the August 19, 1986 meeting further support a conclusion of Andina's lack of knowledge of Gonchecol's fraud.

The discovery that 200,000 bags of coffee were missing and that Gonchecol had presented fraudulent truck bills of lading for payment came as a complete shock and surprise to the Banks and Andina's management. Neither the financing Banks nor Andina had any inkling that their moneys had been misappropriated in an age-old type of fraud — through the use of false draw documents to obtain payments of letters of credit. The Banks had enjoyed a close working relationship with a major, reputable, and profitable importer, which in turn had dealt with and trusted its founding principals — members of one of the largest, best respected, and most successful Colombian coffee exporting families.[54]

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54. Significantly, *Affiliated* at one point in 1991 argued this very point persuasively. In a memorandum of law in support of its motion for summary judgment, *Affiliated* asserted:

> The fact that neither Andina nor the financing Banks perceived any risk of fraud on the part of Gonchecol is confirmed by the commercial context of the commodities financing in this case. Andina had the

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same ownership as the Gonche Group. The Banks knew that Andina and the Gonches were inter-related. The Banks also knew of Andina's role as commission and financing agent for the Colombian exporters, as well as its purpose in minimizing taxable income for the principals. Finally, the Banks kept an abundance of information on file about the various business ventures of Andina's principals and relied upon their wealth and reputation in extending credit.

Andina trusted its principal shareholders completely and never contemplated being defrauded by them. Likewise, the Banks trusted the exporters and relied on the relationship between the exporters and Andina in financing Andina. The Banks also trusted Andina because they had excellent relationships with that company.

As importer, Andina knew that the only risk of non-existent goods must originate with the exporter. Completely trusting the exporters, its related principals, Andina simply did not believe there was a risk of non-existent goods in its precise factual situation. No reasonable business person would expect an importer in Andina's position to insure against the fraud of its "principals."

Likewise, the Banks would have viewed the risk of non-existent goods — in other words, of the exporter's fraud — as itself nonexistent or highly remote. First, as demonstrated above, the Banks knew of the relationship between the exporters and Andina. The reputation and financial banking of the Gonche Group was used as justification for the Banks to extend credit to Andina and was seen as a mitigating factor to risk. It was well-known that "[t]he Echeverri Group

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Appendix C

Another reason why the discovery of the fraud came suddenly, unexpectedly, and unbelievably for the Banks and Andina was because Gonchecol had continued to supply coffee up until May or June, 1986. Andina obtained coffee for its sales to the roasters and used the payments it received therefor to repay the Banks millions of dollars of outstanding letter of credit loans.[55] Moreover, prior to the discovery of

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> would never let Andina suffer any type of financial difficulty." For example, if a financed shipment did not reach port for any reason, the principals would provide coffee to fulfill their obligation. The Banks did not view fraud on the part of the exporter as a risk of financing, as is evident from their failure to identify this risk in their comprehensive credit analyses. The one Bank which even identified the risk deemed it "unlikely." Thus, the close relationship between the exporters and Andina relieved the Banks, as it would any reasonable commodities financier, of concern about fraud on the part of the exporter.
>
> Second, the Banks trusted Andina because they had excellent relationships with that company. The accounting documents supplied to the Banks by Andina to demonstrate its stability and net worth provided the Banks with confidence in the security of transactions with Andina.

Tr. at 2318-20 (citing Affiliated's Mem. Supp. Summ. J., May 3, 1991 at 59-61.) The memorandum concluded that "[t]he commercial reality in this case is that reasonable business persons in the positions of either the importer or the financing banks would not perceive any risk of fraud on the part of the exporter." *Id.* at 61.

55. For example, American Express Bank — like many of the other Banks — experienced a sudden onset of slow notes and loans

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the fraud, Andina had experienced similar delays in shipments of coffee. Periodically, Andina's inventory would accumulate in Colombia and its inland portion of the financing cycle would lengthen due to port congestion, strikes, or problems in securing military escorts for the transport of coffee from the mills to the port.[56] For example, in 1983, a protracted dock strike in Colombia caused a buildup of 92 percent of Andina's inventory in Colombia.[57] Not surprisingly, the debacle of 1986 caught the Banks and Andina wholly by surprise.

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past due from Andina. On July 10, 1986, at the time of Andina's 60-day request for extension of credit, 70 percent of Andina's outstanding loans had been outstanding for less than 150 days. Pls.'s Ex. 52 at 0004308. In addition, up to that point, Andina had repaid 15 letters of credit making payments totalling $12,750,700 in 1986. Pls.'s Ex. 15-b (showing that Andina repaid the 15 letters of credit in 1986 as follows: four in January; two in January and February; four in February; two in March; one in April; one in April and May; and one in June and July). These letters of credit had been opened between June 27, 1985 and February 26, 1986; the average length of time between the opening of the letter of credit and Andina's repayment was 4.6 months or approximately 138 days. Pls.'s Ex. 15-b. The maximum tenor of the financing cycle was 150 days at the time of the discovery of the fraud. Tr. at 218 (Nead testimony). American Express Bank eliminated a sublimit of $5 million on inland financing in 1984; thereafter, American Express Bank did not monitor the intervals within the financing cycle. Ex. 49-2; tr. at 879 (Oster testimony).

56. Tr. at 293 (Nead testimony).

57. Pls.'s Ex. 49-6 at 005443; *see also* Pls.'s Ex. CH 41 at 703029; Pls.'s Ex. CH 42-a.

Appendix C

In the aftermath of the discovery and confession of the fraud, the Banks notified Affiliated of the losses and filed timely proofs of losses. At no time did the Banks conceal any material information regarding the fraud.

IV. Affiliated's Pre-Trial Conduct

The subsequent chapter of this case concerns the conduct of Affiliated in preparation for trial, specifically its efforts to concoct a defense to the Banks' claims. In 1990, Affiliated retained the firm of Podvey, Sachs, Meanor, Catenacci, Hildner & Cocoziello ("Podvey, Sachs") as its sole counsel in the instant litigation. As Affiliated readily admitted at trial, at that time, Affiliated had no witnesses to help advance a cognizable defense.[58] Among its numerous attempted theories, Affiliated reasoned that proof of Andina's and the Banks' complicity in the fraud would bar recovery under the Policy's "dishonesty" clause. To that end, between 1990 and 1994, Affiliated engaged in secret, questionable negotiations to induce Ruben Echeverri and his brothers, Luis and Jorge Hernan, to impute to the Banks and Andina knowledge of and participation in the fraud. Affiliated's pretrial strategy, which is summarized below, at a minimum casts doubt on the management's integrity in its attempt to find a cognizable defense.

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58. Lead counsel emphasized repeatedly during his summation that Affiliated had no witnesses, tr. at 2357, 2360, and that as a last resort Affiliated "investigated" this claim by going to Colombia. Tr. at 2361 (stating "[s]o the only place and the only way that this insurance company could possibly investigate this claim was to go to Colombia . . . [and] we did because we had no choice").

Appendix C

A. Affiliated's Activities in 1990

In 1990, as part of its casting about for a defense strategy, Affiliated retained an investigator named Josiah Thompson ("Thompson") to conduct research related to the coffee business and this case in Colombia. He allegedly spent months interviewing unnamed sources. While in Colombia, Thompson repeatedly contacted the Echeverris' counsel, Juan Parada ("Parada"). Thompson sought and failed to arrange for Affiliated to meet with the Echeverris, but succeeded in obtaining a memorandum from Parada, which responded to questions Thompson had posed to the Echeverris.[59] In violation of its pretrial discovery obligations, Affiliated did not disclose to the Banks or Andina either Thompson's contacts with Parada or Parada's memorandum; several years later Affiliated was finally compelled to make the requisite disclosures of its activities.

B. Affiliated's Activities in 1992

In 1992, Thompson contacted Parada again to renew Affiliated's efforts to interview the Echeverris.[60] On May 13, 1992, Thompson and a Podvey, Sachs attorney named Michael O'Kane ("O'Kane") met Parada in Bogota. At the meeting, Thompson specifically stated that he "wanted Kessler." Andina by that time had been destroyed by Ruben

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59. Thompson, Affiliated's Supplemental and Counter Deposition Designations, at 148.

60. Thompson, Affiliated's Supplemental and Counter Deposition Designations, at 148.

Echeverri's fraud; the flourishing coffee importation business and Kessler long since were gone. Little further damage could result from making Ruben a turncoat as to Andina, for a price. O'Kane and Thompson proposed that the Echeverris should collaborate with the insurance company by "cooperat[ing] fully in debriefings"[61] and in exchange Affiliated would take measures in an attempt to obtain immunity for the Echeverris from state and federal prosecution in the United States for the host of matters overhanging them, including bank fraud.[62] [63] After the meeting, Thompson and Parada arranged for a meeting of Affiliated's representatives, including their counsel, with Ruben and his brothers in Panama City, Panama. The Echeverris had been advised by Affiliated's representatives that a meeting should not be conducted on United States' soil. Affiliated disclosed none of these contacts to the Banks or to Andina until compelled to do so by the Magistrate Judge assigned to this case.

For two days, on June 3 and 4, 1992, Affiliated's representatives, including their lawyers, accountants, investigators, and sundry personnel met with Ruben, his

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61. Thompson, Affiliated's Supplemental and Counter Deposition Designations, at 164.

62. Thompson, Affiliated's Supplemental and Counter Deposition Designations, at 164 (testifying that "it was made clear to Mr. Echeverri that his statement would be used for two purposes[:] [o]ne was in this particular civil action and the other was in discussions . . . with law enforcement to obtain immunity").

63. Ruben Echeverri's younger brother, Luis Echeverri, faced immigration and tax problems in the United States.

brothers, and Parada in Panama City, Panama. Affiliated's counsel elected to obtain a Court Reporter from his home base in New Jersey, to accompany counsel to Panama to record in detail the interview sessions, which the Court Reporter did. At the conclusion of the two-day session, Affiliated's counsel instructed the Court Reporter to prepare only one copy of the transcript of her notes and to destroy her notes. She complied with the instructions. Affiliated knew, of course, that Ruben was the only witness who could testify to his fraud and who had knowledge of it. Although this lawsuit was in full progress at the time, Affiliated's representatives gave no notice to the plaintiffs of the two-day interview or the destruction of the record thereof.

A second meeting for another interview was then arranged to convene in Key Biscayne, Florida, despite Affiliated's advice to the Echeverris to stay out of the country. Affiliated followed the same procedure as before. Affiliated brought along the Court Reporter from New Jersey; she took the notes of the interview and was given the same instruction — to deliver one copy to counsel and to destroy her notes. She did.

At each meeting, remarkably considering what was at stake and promised to the Echeverris for their input, Ruben made clear, if it had been missed before, that the Banks had had no knowledge of Ruben's fraudulent activity and that he could not provide Affiliated with any documentary evidence to the contrary. As to the defunct Andina, he was willing to say that Andina's officers knew Ruben had manufactured false truck bills of lading. Nonetheless, Affiliated's representatives continued insistently to condition

assistance with obtaining immunity from criminal prosecution on Ruben's inculpating the Banks.[64]

After the Florida meeting, O'Kane or Thompson, or both, prepared a statement for Ruben's signature. On August 26, 1992, Ruben travelled to the New Jersey offices of Podvey, Sachs to sign it in exchange for the promised help on the immunity effort.

Affiliated's counsel represented that he then destroyed his copies of the transcripts of the interviews. Counsel explained his actions with respect to the instructions to the Court Reporter and his destruction of the transcripts by stating that this was his practice for every witness interview that was followed by a sworn statement. Counsel added that he had given the Court Reporter those instructions at the time she was retained and prior to his knowing the substance of the interview.

Also in August, 1992, Thompson and O'Kane met again with Luis Echeverri in Cali, Colombia. In fact, between 1990 and approximately 1993, Thompson and O'Kane met with Ruben Echeverri between five and ten times in Colombia.[65] At these meetings, O'Kane always stressed that the only way the Echeverris could obtain immunity would be by accusing Andina and the Banks of knowledge of the fraud that Ruben had perpetrated.[66] Affiliated's representatives did not disclose

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64. Echeverri deposition, at 519.

65. Echeverri deposition, at 530-32.

66. Echeverri deposition, at 531-32.

the extended, recorded meetings they had with the Echeverris, the pressures imposed to procure inculpatory statements from them, or the destroyed transcripts taken over three days from their most significant witness, discovery rules *non constat*.

In October or November, 1992, Affiliated's counsel, without notifying Andina or the Banks, met with the Manhattan District Attorney's office ("Manhattan D.A.") and alleged that some of the plaintiffs, their *officers and counsel* had committed criminal offenses. To support its charges, Affiliated provided the Manhattan D.A. with the proffers of the signed Echeverri statements in order to instigate a criminal investigation of the Banks, Andina, their officers and counsel for plaintiffs. Affiliated also disclosed documents and testimony subject to a confidentiality order of Judge Broderick of this Court who was administering this case at that time, without informing the Manhattan D.A. that such an order was in effect.[67] The Banks and Andina learned of the secret meetings between Affiliated and the Echeverris in February, 1993, when Affiliated filed a motion to amend its complaint and assert a third-party complaint for insurance fraud against the Banks and Andina, their counsel, and several Andina officers. Affiliated's motion was denied. Disclosure of the statements and events at Panama City, Panama and Key Biscayne, Florida did not surface for another year.

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67. The Manhattan D.A.'s office terminated the criminal investigation of the Andina matter in June, 1993.

Appendix C

C. Affiliated's Activities in 1993

In the spring of 1993, Affiliated's representatives continued to convene secret meetings with the Echeverris. Affiliated sought to obtain further statements and documentary evidence from Ruben Echeverri implicating not only Andina but also the Banks with knowledge of the fraud. Affiliated persisted in this pursuit even though Ruben Echeverri had previously remained firm in his assertion to Affiliated's representatives that he could not comply because he had no knowledge of — and could offer no documents that showed — any awareness on the part of the Banks of the fraud.[68]

Nonetheless, Parada brought to Echeverri's offices a statement dated May 6, 1993 ("the May 6, 1993 statement"), which implicated the Banks with knowledge of the fraud and which Affiliated had drafted for Echeverri to sign. At the time, Parada indicated that the statement would furnish Echeverri with a "passport" to obtain immunity, and Echeverri signed the statement without reading it.[69] Thus, despite the fact that Ruben was Affiliated's key witness on its contentions that the Banks and Andina knew of the fraud — in direct repudiation of the Banks' and Andina's contentions as to their ignorance of the fraud — Affiliated's representatives prepared this subsequent statement, which charged the Banks' with knowledge of the fraud and which contention Ruben himself had successively disavowed.

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68. Echeverri deposition, at 510-13.

69. Echeverri deposition, at 432-35.

Affiliated's counsel made no effort at trial to set the record straight on Ruben's disavowal of the Banks' knowledge of the fraud. Affiliated did not disclose to the Banks or Andina any of its dealings with the Echeverris or furnish copies of any of the statements or proffers obtained.

On June 30, 1993, the Manhattan Assistant District Attorney in charge of investigating the fraud notified Judge Broderick that his office had terminated its investigation of the matter. On July 6, 1993, based on this notice and on alleged verbal statements by federal prosecutors in New York and in Florida to Affiliated's representatives that those offices would not investigate the fraud further, Affiliated's lead counsel sent a letter to Parada. The letter concluded that "[t]he result of all this is that your clients are free from any criminal prosecution arising from the events surrounding the collapse of Andina in 1986."[70]

On July 14, 1993, Affiliated gave notice to Andina and the Banks to depose the Echeverris in Cali, Colombia, but continued to withhold the Echeverri statements. The Magistrate Judge assigned to the case ordered the depositions to be held in London, and further ordered Affiliated to produce the written proffers of the Echeverris' statements.

D. Affiliated's Activities in 1994

Affiliated finally produced to Andina and the Banks copies of the written proffers of the Echeverris' statements on January 18 and 19, 1994. Several weeks later Affiliated

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70. Ch. Ex. "Echeverri Statements" at 1000053 (tab 68).

produced copies of the signed statements. Approximately ten days before the scheduled depositions in London, Ruben Echeverri and Parada met with Affiliated's representatives in Miami.[71] During this meeting, Echeverri understood that Affiliated again wanted him to testify that both Andina and the Banks knew of the fraud despite Echeverri's prior steadfast denial of any knowledge that the Banks knew of the fraud.[72]

On February 9, 1994, at the Miami airport while en route to London for the deposition, federal agents arrested Ruben Echeverri, who subsequently pleaded guilty to and was convicted of bank fraud. After his arrest, notwithstanding a clear conflict of interest, Echeverri was represented initially by O'Kane and then by a former partner of Affiliated's lead counsel. Eventually, Echeverri retained new counsel. In 1996, while serving two concurrent four-year terms of imprisonment, the parties deposed Ruben Echeverri at a federal prison in North Carolina. Affiliated furnished a video of that deposition, which the Court received for its content and credibility value.

V. The Banks' or Andina's Alleged Complicity in the Fraud

A. The Banks

Affiliated failed to produce a scintilla of evidence that the Banks knew of or participated in the fraud. The evidence overwhelmingly shows that the Banks had no inkling

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71. Echeverri deposition, at 509.

72. Echeverri deposition, at 510-13.

whatsoever, prior to the discovery of the fraud, that Gonchecol created and presented false truck bills of lading in order to draw down on letters of credit. Credible witness testimony indicated, without exception, the Banks' total ignorance of Gonchecol's fraudulent intent and practices. Trial exhibits spoke on two sides of the issue making it necessary to evaluate them in light of the other evidence. Moreover, Ruben Echeverri, Affiliated's "primary witness"[73] — except for the highly suspect May 6, 1993 statement, which Echeverri was told was his "passport" to immunity[74] — exonerated the Banks absolutely in every statement he provided to Affiliated prior to his arrest and to law enforcement personnel and to the Banks after his arrest. Following his arrest, Echeverri further acknowledged that, had the Banks known the Gonche Group manufactured false truck bills of lading, the Banks unquestionably would have ceased financing Andina.[75]

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73. Affiliated's Summary of Relevant Deposition Testimony of Ruben Echeverri Taken November 1996.

74. *See* Echeverri, Plaintiffs' Deposition Designations, at 271 (stating that the Banks had no reason to know Gonchecol diverted the proceeds from the letters of credit to other business ventures), 512 (stating that "at any moment I did not know that [the banks] did have knowledge of [the fraud]"); 518 (stating that at the meeting in Panama City on or about June 1992, Ruben told Sachs and his colleagues that he had no knowledge that the banks knew the truck bills of lading were false); 519 (stating that Ruben told Sachs and his colleagues that he had never been able to find any information to implicate the Banks).

75. Pls.'s Ex. Echv 62 at 4 (summarizing meeting with Ruben Echeverri, Chemical Bank's counsel, and representatives of the United States Attorneys' Office held on November 2, 1994).

Appendix C

B. Andina

Similarly, Affiliated also failed to present by a preponderance of the credible evidence that Andina's management engaged in "conversion, misappropriation or other dishonest acts committed by or on behalf of the named Assured" regarding any matter covered by the Affiliated policy either through their knowledge of or participation in Gonchecol's presentation of false truck bills of lading or otherwise. Affiliated offered only two witnesses who had personal knowledge regarding Andina's affairs during the time in question: Ruben Echeverri and Mark Rudnick, a computer analyst in charge of Andina's information systems. Both witnesses — either because of their lack of credibility or because of the statements they made at the time of the discovery of the fraud — thoroughly discredit Affiliated's contention that Andina knew of or participated in the fraud.

In his second public statement regarding the Gonchecol fraud, at the August 19, 1986 Bogota meeting, Ruben Echeverri expressly exonerated Andina of any knowledge or wrongdoing related to the fraud. Six and seven years later (on August 26, 1992 and on May 6, 1993), in a desperate and futile attempt to keep Gonchecol viable, in part, by staving off prosecution, Echeverri agreed to collaborate with Affiliated and signed statements implicating Andina. Echeverri's motivations for implicating Andina are various: possibly revenge for Andina's refusal to send moneys immediately before and after the discovery of the fraud; and, possibly a fruitless desire to avoid prosecution and force the United States financing banks to negotiate a commercial resolution to the debacle. The fact that Echeverri continued

to implicate Andina following his arrest in no way diminishes his motivation to punish Andina for its assertion of autonomy from the Gonche Group.

Equally important in disproving Affiliated's contrived theory is the testimony of Mark Rudnick. Rudnick served as the director of Andina's computer department starting in the Spring of 1985.[76] Rudnick testified that during his tenure as director of the computer department, even though he had frequent contact with Kessler and was in charge of the computer system that tracked Andina's finance cycle, he never suspected Andina to be involved in a fraud or suspected the Gonche Group of defrauding Andina or the Banks. After Ruben Echeverri's arrest, when interviewed by federal law enforcement personnel, Affiliated's witness, Rudnick, reported that "[t]here was nothing that [he] had ever seen . . . that would raise a red flag in any reasonable person's mind."[77] Similarly, as to the Banks, although the Banks' officers supervised the exporters and the Andina account in a relaxed manner, as testified by the Banks' witnesses and as shown in the documentary evidence, the circumstances at the time did not give rise to the level of "red flags in any reasonable person's mind" of fraud by Gonchecol.

Rudnick's testimony at trial and Echeverri's confessions in August, 1986 if taken alone support the conclusion that Andina's management did not engage in any conversion,

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76. Andina utilized a computer system called the Harris computer to track its importation cycle, but many of its management, including Kessler, found it ineffective and cumbersome.

77. Tr. at 1693 (Rudnick testimony).

misappropriation, or dishonest acts by or on behalf of Andina or the Banks.

ADDITIONAL SPECIFIC FINDINGS

1. Plaintiffs commenced these actions against defendant Affiliated FM Insurance Company for breach of its contractual obligations under an insurance policy entitled "Marine Open Cargo Policy OCP-302" issued by Affiliated to Andina on or about July 23, 1980.

2. At the commencement of these actions each of the plaintiffs was a citizen of a state other than Rhode Island or a nation other than the United States and had its principal place of business within the United States in the Southern District of New York. Defendant Affiliated is a citizen of the State of Rhode Island.

3. The matter in controversy for each of the actions commenced by the plaintiffs exceeds $50,000, exclusive of interest and costs, and this Court has subject matter jurisdiction over these cases based upon 28 U.S.C. § 1332(a).

4. Each of the Banks is named in the Affiliated Policy as an additional assured, as provided in Clause 2 of the Affiliated Policy and in separate endorsements (Nos. 6 (as amended by No. 32), 10, 13, 30, 31 and 34) entitled "Special Terms and Conditions" (the "Bankers' Endorsements").

5. Clause 37(D) of the Affiliated Policy (as amended by Endorsement No. 33, the "FBOL Clause") specifically provides, in a section entitled "Special Conditions," that:

Appendix C

> This policy covers loss or damage occasioned through the acceptance by the Assured and/or their agents or shippers of fraudulent Bills of Lading and/or shipping receipts and/or messenger receipts and/or warehouse receipts and/or truckmen's receipts.

6. Each of the Bankers' Endorsements provides, among other things, that:

> [T]his policy shall not be canceled nor materially changed as to the interest of the Bank unless 10 days' . . . prior written notice of such change or cancellation shall have been given to the Bank.

7. In addition, each of the Bankers' Endorsements provided that each Bank's interest under the Affiliated Policy would not be impaired by any act or neglect of or breach of any warranty by Andina.

8. Clause 15 of the Affiliated Policy provides that if any other insurance is subsequently obtained on the same interest, Affiliated is "nevertheless answerable for the full extent of the sum insured" by it "without right to claim contribution from such subsequent insurers."

9. As a condition of the financing provided by each Bank, Andina was required to maintain suitable insurance and to provide audited and certified financial statements to the Banks.

Appendix C

10. The Affiliated Policy requires that, "[i]n the case of loss or damage, such loss or damage is to be paid in thirty days after proof of loss . . . ."

11. Andina was an United States importer of coffee from Colombia, and, at all relevant times, its business was managed by Humberto Canal and Dennis Kessler.

12. At all relevant times, Gonchecol was an exporter of coffee to Andina and, for most of that time, Ruben Echeverri was one of Gonchecol's principal officers.

13. Each of the Banks (as well as other financial institutions) extended separate secured lines of credit to Andina. Pursuant to those lines of credit, Andina transactionally financed, by letters of credit, its purchases of coffee from Colombian exporters.

14. Andina paid and Affiliated accepted premiums under the Affiliated Policy, including quarterly deposit premiums pursuant to Endorsement No. 17, which deposit premiums were adjusted periodically in accordance with the Affiliated Policy.

15. Between 1974 and up to 1986, the Banks extended hundreds of millions of dollars of credit to Andina (pursuant to letter of credit transactions of the type involved in this action), all of which was timely repaid.

16. In extending financing to Andina, each Bank required Andina to provide it with insurance coverage, and relied upon the insurance obtained by Andina from Affiliated

which included, among other provisions, as a special condition, protection for Andina and for each Bank for "loss or damage occasioned through the acceptance by the assured and/or their agents or shippers of fraudulent Bills of Lading and/or shipping receipts and/or messenger receipts and/or warehouse receipts and/or truckmen's receipts."

17. The Banks kept an abundance of information on file about the various business ventures of Andina's principals and relied upon their wealth and reputation in extending credit.

18. Andina trusted its principal shareholders, including Gonchecol, and never contemplated or suspected being defrauded by them.

19. The Banks trusted the exporters and relied on the relationship between the exporters and Andina in financing Andina. The Banks also trusted Andina because they had excellent relationships with that Company.

20. Completely trusting the exporters, its related principals, Andina simply did not believe there was a risk of nonexistent goods in its precise factual situation.

21. It was well known and believed that the Echeverri Group of the exporters would never let Andina suffer any type of financial difficulty.

22. The commercial reality in this case was that reasonable business persons in the positions of either the importer, Andina, or the financing Banks would not perceive

or suspect any risk of fraud on the part of the exporter in its relationships with either Andina or the Banks. It was that trust and confidence which motivated the issuance of letters of credit and enabled the exporter to receive time and indulgence from the Banks and Andina in the slowly elongating cycle of deliveries of coffee during the Spring of 1986.

23. Each letter of credit provided that the Colombian exporter, as beneficiary, could obtain payment from a Bank by presenting certain draw documents (the "Draw Documents"), including truck bills of lading. The truck bills of lading provided apparent confirmation to the Bank of the existence of coffee and the commencement of the export cycle.

24. The Letter of Credit Department of each Bank independently administered and serviced its own letter of credit transactions for the account of Andina. Each Bank's Letter of Credit Department determined whether the Draw Documents for the letters of credit at issue here conformed to the terms of the applicable letter of credit and, when necessary, obtained waivers of discrepancies from Andina before accepting and paying the Colombian exporter in accordance with the letter of credit. Each Bank's Letter of Credit Department accepted the truck bills of lading as Draw Documents prior to payment.

25. No plaintiff disputes that the Affiliated Policy was canceled with respect to Andina for shipments occurring on and after February 25, 1986.

Appendix C

26. Affiliated did not send notice of cancellation of the insurance herein involved to any Bank prior to March 11, 1986, and the Affiliated Policy was not canceled as to the interest of any Bank prior to March 21, 1986.

27. On August 14, 1986, representatives of Andina and the Banks met in New York to discuss possible solutions to a liquidity crisis, which they were told and believed Gonchecol was experiencing. During the course of that meeting, Humberto Canal and Robert Nead (of American Express Bank) called from Colombia to inform the group assembled in New York that approximately 200,000 bags of coffee financed by the Banks through letter of credit payments made between January, 1986 and June, 1986 had not been located.

28. At a meeting in Colombia on August 19, 1986, in the office of a local attorney attended by representatives of Chemical Bank, American Express, NatWest and Gonchecol, and others, in all, over 20 persons, whereat Ruben Echeverri admitted that the truck bills of lading prepared by Gonchecol and Ruben and utilized by Ruben to draw payment on the letters of credit issued by the Banks were false and fraudulent in that the coffee referenced in such truck bills of lading was not in the possession of either the trucker or the port forwarder. Echeverri further stated that Andina was not aware of and did not participate in the fraud and had no knowledge thereof. He had made a similar disclosure as to the use of fraudulent truck bills of lading to a Bank representative on August 14, 1986.

Appendix C

29. Prior to August 14, 1986 neither the Banks nor Andina knew of the fraud perpetrated upon them by Ruben Echeverri and Gonchecol.

30. A discrepancy between the truck bills of lading and the actual coffee shipped by Gonchecol and Ruben Echeverri began to raise questions with Andina and the Banks in the Spring of 1986. By May, 1986 questions raised by them were discussed at the meeting of Andina's board of directors and purportedly were explained by Ruben as due in part to traffic jams at the port of embarkation, as involved in a money stringency of the exporters due to gyrations in the value of the peso and as due to the burden of export tax regulations, the cuchilla. The significant slowdown in deliveries from the exporters commenced in the second part of June, 1986. In early August, 1986 Echeverri sought vainly to obtain loan accommodations from Colombian bank sources. Ultimately on August 14 and 19, 1986 Ruben confessed that the coffee that purportedly backed up the truck bills of lading did not exist. The only time Andina realized that the Gonche Group was incapacitated to ship the coffee was when their fraud was confessed by Ruben as aforesaid.

31. Each of the truck bills of lading included in the Draw Documents presented under the letters of credit upon which losses were incurred by plaintiffs ("Fraudulent Document Losses") was fraudulent in that the coffee represented by the truck bills of lading did not exist when such documents were presented to and accepted by the Banks in New York and when the corresponding letters of credit were paid, and the said truck bills of lading were the proximate efficient and dominant cause of all of the Banks' losses.

Appendix C

32. There is no evidence that any ocean shipment ever commenced as to any of the coffee associated with the Fraudulent Document Losses.

33. As a result of their acceptance of the fraudulent truck bills of lading presented to draw under the relevant letters of credit, the Banks suffered Fraudulent Document Losses in the principal amount of $94,598,368.

34. Upon discovery of the fraud, each plaintiff gave timely written notice of loss to Affiliated. These notices of loss were submitted to Affiliated between August 21, 1986 and September 5, 1986.

35. Each plaintiff timely filed a written proof of loss with Affiliated between October 3, 1986 and October 23, 1986.[78]

36. Commencing on September 2, 1986, the Banks provided Affiliated with additional information and documentation supporting their losses, requested forms from Affiliated, proposed that a surveyor be appointed, and offered to make their employees available for interviews by Affiliated.

37. Affiliated did not accept any of the Banks' offers to interview any of their employees, and ignored the Banks' requests and proposals set forth in the preceding paragraph.

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78. Chemical Bank and Andina filed their amended proofs of loss on March 3, 1989 and November 4, 1986, respectively.

Appendix C

38. Neither Andina nor any of the Banks concealed from Affiliated any material facts concerning their losses.

39. The Banks and Andina in good faith fulfilled all obligations to Affiliated required to be performed in connection with their claims.

40. There is no credible evidence whatsoever that the Banks were privy to the fraud.

41. Each of the Endorsements on Affiliated's Policies provided that "[t]his agreement shall not extend the said policy to cover any additional risks, it being especially agreed that the policy does not insure against conversion, misappropriation or other dishonest acts committed by or on behalf of the named Assureds."

42. There is no credible evidence that Andina or its officers Canal or Kessler were privy to any fraud or dishonest act committed by or on behalf of the named assureds. The defendant failed to prove by a fair preponderance of the credible evidence that any dishonest acts were committed by or on behalf of the named assureds or by Kessler in the transactions of the Banks and of Andina in respect of the letters of credit and the false truck bills of lading created, issued or utilized by, or on behalf of Ruben Echeverri or Gonchecol.

43. The Banks' losses have not been paid by Affiliated.

44. Andina's losses have not been paid by Affiliated and Andina has assigned the proceeds of its claims under the Affiliated Policy to the Banks.

Appendix C

45. The Banks' claims against Affiliated for the Fraudulent Document Losses arising under letters of credit drawn and paid prior to March 21, 1986 are as follows:

Unpaid Fraudulent Document Losses prior to March 21, 1986

Bank	**Amount**
Chemical Bank	$14,860,000
Banque Paribas	14,392,500
American Express Bank	7,049,500
NatWest Bank	5,762,000
Rabobank Nederland	1,620,000
European American Bank	490,000
TOTAL:	$44,174,000

46. Pre-judgment interest on the principal amount of $44,174,000 unpaid to the Banks continues to accrue at a per annum rate of 9% or at a per diem rate of $10,892 from January 1, 1987.

47. Andina's claims against Affiliated for Fraudulent Document Losses arising under letters of credit paid before February 25, 1986, which are not duplicative of losses claimed by the Banks, are in the principal amount of $2,975,000. Pre-judgment interest on the principal amount of $2,975,000 continues to accrue at a *per diem* rate of $733 from January 1, 1987. Andina has assigned its claims in this litigation to the Banks to satisfy the loans it incurred from the drawn upon letters of credit.

Appendix C

48. In addition to the Fraudulent Document Losses the Banks claim against Affiliated, the Banks incurred Fraudulent Document Losses on and after March 21, 1986 in the principal amount of $50,424,368 (before interest).

49. Each of the plaintiffs asserted claims for Fraudulent Document Losses incurred on and after March 21, 1986 against the London insurers and the insurance brokers Hogg Robinson and Gardner Mountain Limited and Hogg Robinson (Cargo) Limited (together, "Hogg Robinson") and Trinder & Norwood ("T&N"), which purported to have placed "Ocean Open Cargo Policy No. TN-OCP-1811" (the "London Policy").

50. The London Insurers denied the plaintiffs' claims based upon, among other things, the defense that the London Policy was not properly bound and was void ab initio as a result of alleged placing errors and non-disclosures by Hogg Robinson and T&N. T&N and Hogg Robinson did not disclose to the London Insurers the fact that Affiliated had issued notices of cancellation of the Affiliated Policy dated November 27, 1985 and February 20, 1986 or the contents thereof. No Bank was advised of such purported cancellations and no Bank knew that the London Insurers had or would assert these defenses until after August, 1986.

51. In January, 1993, plaintiffs settled their claims against the London Insurers, Hogg Robinson and T&N for $25,217,375 (the "London Settlement").

52. Prior to the London Settlement, the Banks recovered $26,485,533 (before expenses shared by the Banks) from

the liquidation of property voluntarily delivered to the Banks by Andina. This amount properly excludes $2,288,366 in expenses incurred by Andina during liquidation.

53. In January, 1995, Ruben Echeverri agreed to provide partial monetary restitution to the Banks. Pursuant to that agreement, the Banks have received $10,500,000 from Gonchecol, and Gonchecol has promised to pay $500,000 per year for nine years without interest (absent a default). On April 25, 1997, a payment of $11,250 was received by the Banks from Gonchecol as payment of interest in consideration of the deferral to April 30, 1997 of the $500,000 payment due on January 31, 1997, which has not been received. On May 27, 1997, an additional payment of $11,250 was received by the Banks from Gonchecol in connection with a request to defer the $500,000 payment due on April 30, 1997 to July 31, 1997.

54. The Banks' loan agreements with Andina, which preceded the discovery of the fraud, authorized the Banks to apply all recoveries in any manner they selected. The relevant provisions of those agreements were reconfirmed by the Banks and Andina after the discovery of the fraud.

55. In addition, Andina under its existing by-laws and corporate structure, directed each Bank to apply all recoveries to payment in full of Andina's reimbursement obligations with respect to the letters of credit upon which Fraudulent Document Losses were incurred in the inverse chronological order of draw date. This was a permissible voluntary agreement and not made under duress.

Appendix C

56. From August, 1986, each of the Banks was entitled to charge interest on Andina's obligations at or above the prime rate.

57. The Banks have agreed to share recoveries and related expenses with respect to the Fraudulent Document Losses. Chemical Bank acts as Collateral Agent for the Banks in connection with shared recoveries and related expenses.

58. After application of the recoveries to the principal amount of the Fraudulent Document Losses incurred by the Banks on and after March 21, 1986 (and to interest accrued thereon either at the prime rate or at the legal rate of 9% per annum, but before expenses), such losses have not been fully recovered, and no balance remains for application to the Banks' claims against Affiliated.

59. No part of plaintiffs' recoveries are available for application to their claims against Affiliated.

60. From and after 1980, T&N was engaged by Andina to obtain and service insurance concerning certain aspects of Andina's business. T&N acted as Andina's broker, for certain limited purposes, in connection with the Affiliated Policy.

61. On February 25, 1986, T&N purportedly advised Andina that coverage had been placed with the London Insurers under the London Policy "effective with all shipments made on/or after February 25, 1986."

Appendix C

62. T&N expected Affiliated to send notices of cancellation to the Banks.

63. Affiliated sent notices of cancellation of the Affiliated Policy to three of the Banks on March 11, 1986 and claims that it sent notice of cancellation to the other three Banks on that date.

64. Affiliated enclosed with the March 11, 1986 notice of cancellation Endorsement No. 38 to the Affiliated Policy which had a signature line for the "Assured." Such endorsement was never signed by Andina or the Banks.

65. T&N never communicated with any Bank regarding the purported cancellation of the Affiliated Policy; no Bank advised T&N at any time that T&N was authorized to commit a Bank regarding cancellation of or replacement of the Affiliated Policy; no Bank ever advised T&N that it was authorized to waive the cancellation provision.

66. There is no evidence that T&N purported to cancel the Affiliated Policy on behalf of any Bank.

67. There is no evidence that any Bank engaged in any conduct that would have led Affiliated to conclude that T&N was authorized to act for such Bank independently without express authorization regarding cancellation or replacement of the Affiliated Policy.

68. A modification or elimination of the Banks' rights to 10 days' prior written notice of cancellation is, in itself, a material change that would require 10 days' prior written

notice. No such notice was ever given, nor was any such modification or elimination effected.

69. The Banks did not agree to waive or release any liability of Affiliated under the Affiliated Policy, and T&N had no authority to waive any rights of the Banks under the Policy.

70. The Affiliated Policy was not canceled as to the interest of any Bank prior to March 21, 1986.

71. The London Policy (Finding # 49) became effective as to all ocean shipments on and after February 25, 1986. Defendant contended herein that the London Policy also, by an Endorsement No. 9, covered the Colombian interior risk for shipments where an ocean bill of lading had issued on or after February 25, 1986.

72. Endorsement No. 9, dated April 22, 1986 ("Endorsement No. 9"), is an endorsement to the London Policy. It is not an endorsement to the Affiliated Policy.

73. At the time Endorsement No. 9 was issued, all of the Fraudulent Document Losses claimed against Affiliated had already occurred.

74. The last endorsement to the Affiliated Policy is Endorsement 38, which bears the typewritten date February 25, 1986. After issuance of Endorsement 38, there was no advice from Affiliated of any further changes to the Affiliated Policy.

Appendix C

75. No evidence was presented that written notice was given to the Banks of any purported changes to the Affiliated Policy resulting from the issuance of Endorsement No. 9.

76. No Bank received a copy of the London Policy prior to May 14, 1986.

77. When the London Policy was sent to the Banks on May 14, 1986, it did not contain a copy of Endorsement No. 9.

78. Even if Endorsement No. 9 covered interior risks without ocean shipment, the London Policy is insurance on that interest subsequent in date to the Affiliated Policy. In addition, Endorsement No. 9 only covers shipments of actual coffee that had commenced interior transit before February 25, 1986.

79. Endorsement No. 9 to the London Policy did not alter or affect the Banks' coverage under the Affiliated Policy.

80. All of the truck bills of lading presented to and accepted by the Banks which resulted in the Fraudulent Document Losses are fraudulent because the coffee represented thereby did not exist and thus was not in the possession of or taken in charge by the trucker at the time that such truck bills of lading were presented as Draw Documents and accepted by the Banks.

81. The truck bills of lading presented to the Banks under the letters of credit issued by the Banks evidenced that the trucker had assumed responsibility for the coffee.

Appendix C

82. There is no evidence that the date on the truck bills of lading represented the actual issuance date of those documents. The date appearing on the truck bills of lading represented the issuance date only for purposes of "staleness" under the UCP 400 and was not necessarily the actual issuance date.

83. The letters to the Banks from Colombian banks transmitting the Draw Documents were not Draw Documents under the letters of credit.

84. The letter of credit document examiners at each Bank were required to check only the Draw Documents for their compliance with the letters of credit.

85. The dates on the truck bills of lading or the letters transmitting the same did not put any Bank on notice of any misconduct.

86. The letters of credit at issue in the litigations conducted in the Supreme Court, State of New York, entitled *Andina Coffee, Inc. v. Cooperative Centrale Raffeisenboerenleenbank B.A.*, et al., Index No. 20123/86, and *Andina Coffee Inc. v. National Westminster Bank U.S.A.*, et al., Index No. 19759/86, were materially different from those on which the Banks make claim here. Additionally, the portions of the State Court submissions relied upon by Affiliated are incorrect or inapplicable to the facts presented here.

87. Prior to mid-August 1986, neither Andina nor any of the Banks had any sufficient reason to suspect that the

coffee financed by draws under the letters of credit did not exist.

88. Prior to the discovery of the fraud in mid-August 1986, neither Andina nor any of the Banks knew that Ruben Echeverri or his family had an ownership interest in and controlled Empresa Nacional De Transportes Ltda., d/b/a Enaltra ("Enaltra"), the Colombian trucker used by Ruben Echeverri to utilize the fraudulent truck bills of lading at issue.

89. Ruben Echeverri's accusation that Andina's management knowingly financed nonexistent coffee is repudiated by Gonchecol's coffee position reports and Andina's Harris computer reports (which were derived therefrom) in that: (a) the position reports did not uniformly report the coffee at all of the mills (coffee was reported at anywhere from 6 to 19 mills); (b) at least 130 lots of Gonchecol's coffee, worth approximately $13,000,000, that did not appear on any position report were, in fact, shipped from Colombia; (c) over $38,000,000 of Goncheverri's and Gonchelopez' coffee financed by Andina between October 1, 1985 and June 19, 1986 is not reported on any position report, and Goncheverri and Gonchelopez have never been accused of fraud; and (d) Ruben Echeverri had nothing to do with the preparation of the reports.

90. Ruben Echeverri's accusation that Dennis Kessler improperly interfered with Arthur Andersen's September 30, 1985 audit of Andina's financial statements by inducing or attempting to induce Arthur Andersen to certify to an overstatement of inventory is not credible. There is no

evidence that Arthur Andersen used anything other than appropriate auditing standards in connection with the inventory audit at the statement date.

91. Andina's bank statement for May, 1986 does not show that funds drawn by Gonchecol under letters of credit were deposited directly to Andina's account to repay prior outstanding letters of credit. Ruben Echeverri acknowledged that Gonchecol had access to dollars with which to pay its obligations to Andina, notwithstanding any Colombian currency control laws.

92. From time to time and in the ordinary course of its business, Andina prepaid its reimbursement obligations arising from draws under letters of credit in order to, among other things, reduce borrowing costs. These prepayments were not evidence of fraud.

93. Once the reimbursement obligation relating to a letter of credit was paid, the Banks had no reason to and did not receive further information or documentation concerning the transaction giving rise to that obligation.

94. Periodically, port congestion, strikes, and quota restrictions delayed shipment of coffee and repayment of sums advanced to purchase such coffee under the letters of credit. As a result, requests were made by Andina from time to time to the exporters for funds to liquidate letters of credit prior to the sale of the coffee being financed, and the exporters complied with these requests. Andina believed that the exporters had ample means to provide such funds.

Appendix C

95. Although Affiliated had knowledge of the coffee exportation process, the Colombian exporters, and the nature of the letter of credit financing provided by the Banks to Andina, it did not specify or restrict the documents to be used as Draw Documents under the letters of credit issued by the Banks.

96. The Affiliated Policy does not require as a condition to coverage:

(i) that the Banks monitor or track any portion of the transaction, including the length of time from the issuance of a truck bill of lading to the issuance of an ocean bill of lading;

(ii) that the Draw Documents to be issued in connection with letter of credit financing be title documents;

(iii) that the Draw Documents to be issued in connection with letter of credit financing be negotiable title documents under Colombia law;

(iv) that the Banks limit the financing provided, including a limitation of the interior portion of the financing;

(v) that the Banks have perfected security interests in insured goods; or

(vi) the use of a "Revision," "Guia," "Orden de Cargue," or "Registro de Contracto" as Draw Documents.

Appendix C

97. Paragraph 38 of the Affiliated Policy provided that Andina would declare shipments to T&N for transmission to Affiliated.

98. The declarations by Andina to T&N were made on a weekly basis when Harry Pedersen, a T&N employee, visited Andina and took letter of credit draw reports, ocean bills of lading and other documents related to declarations and claims.

99. Various employees of T&N would review, notate and compile the Andina documents for transmission to Affiliated. T&N also prepared bordereaux of interior movement, ocean movement, and warehoused coffee.

100. In order to determine the rate to be applied, T&N waited for the ocean bill of lading for each shipment and determined the ocean shipping terms at that time. If the coffee was sold FOB Colombia, Andina was not responsible for insurance of the ocean voyage and an interior movement report and declaration was transmitted by T&N to Affiliated. If coffee was sold under terms making Andina responsible for the insurance of the ocean voyage, an ocean bordereaux and declaration was transmitted by T&N to Affiliated.

101. On occasion, T&N waited as much as a year after the time it was given an initial letter of credit draw report to compile all information concerning a specific shipment and include that information in a bordereaux report. Such delays were the result of the quarterly reporting system for the Affiliated Policy and the need to await information to establish the rate to be applied and as to the valuation of the cargo.

102. This system was followed by T&N. Affiliated accepted declarations under this system, without complaint from at least 1980 through 1986.

103. There was no intentional delay by Andina in making declarations of shipments under the Affiliated Policy.

104. There is no evidence that Affiliated gave written notice to Andina or any Bank of cancellation for reasons of incomplete declarations or nonpayment of premium.

105. The Banks were not required to make declarations or to pay premiums under the Affiliated Policy.

106. Any alleged failure to pay premiums or make declarations by Andina does not affect the Banks' coverage under the Affiliated Policy.

107. Clause 9 (Limit of Insurance) of the Affiliated Policy provides that "[t]his insurance shall cover for not more than $8,000,000 . . . in any one place at any one time." Each presentation and acceptance of fraudulent bills of lading took place at separate Banks at separate times. Each presentation and acceptance was for less than $8,000,000. Clause 9 does not limit the plaintiffs' claims against Affiliated.

108. Clause 10 (Accumulation) of the Affiliated Policy provides:

> "Should there be an accumulation of interests beyond the limits expressed in this policy by reason of any interruption of transit beyond the

> control of the Assured, or by reason of any casualty or at any transhipping point or on a connecting vessel or conveyance, this policy shall attach for the full amount at risk (but in no event for more than twice the policy limit) provided written notice be given (to this Company) as soon as known to the Assured."

109. This accumulation of interests clause is inapplicable to the plaintiffs' claims because (i) no transit had taken place (the relevant truck bills of lading were false and fraudulent in that the coffee described therein did not exist and was never in the possession or under the control of the trucker), and (ii) there was no casualty in transit at any transhipping point or on any vessel or conveyance. Even if Clause 10 were applicable to the losses at issue in this case, it would apply separately to each assured. Thus, Clause 10 is irrelevant because no Bank's principal claim exceeds $16,000,000, and Andina's claims against Affiliated which are not duplicative of losses claimed by the Banks do not exceed $16,000,000.

110. Endorsement No. 3 (Warehouse Endorsement) extends the Affiliated Policy to "cover the goods insured" for the import voyage under this open policy while temporarily situated at the locations listed herein [U.S. warehouse locations], and Endorsement No. 4 (Colombian Locations) extends this coverage to "coffee awaiting export while stored at the following locations in Colombia." The Limit of Liability under Endorsement No. 4 that "this Company shall be liable for no more than $3,000,000 any one location, nor for more than $10,000,000 over all locations

at any one time" is inapplicable. None of the plaintiffs' claims here are due to losses that occurred at warehouse locations.

111. The losses of the plaintiffs sued for herein were not caused by dishonest acts of the assured. No dishonest acts of the named assured, Andina, were the proximate cause of the losses sued on.

112. Andina and its principal officer, Kessler, were not guilty of any conversion, misappropriation or other dishonesty in respect of the false documents utilized to cash the Banks' letters of credit.

113. Decision of these cases turns uniquely on the issue of credibility of the key players and, in a subsidiary way, of the representatives of the parties and their motivations. The issues of credibility herein are resolved in favor of the plaintiffs and against the defendant.

CONCLUSIONS OF LAW

A. The Federal District Court has subject matter jurisdiction over the issues in controversy in this action pursuant to diversity of citizenship and requisite amount in controversy.

B. The venue of the Southern District of New York is proper.

C. This Court having found that all of the Draw Documents submitted to the Banks with respect to the Fraudulent Document Losses were accepted by the Banks in

New York and that no ocean shipment ever commenced as to such losses, admiralty jurisdiction does not exist in this case.

D. New York law is the controlling substantive law.

E. The plaintiffs base their claims on the undisputed fact that truck bills of lading presented to draw upon letters of credit were false in that the stated cargo did not exist at the time the truck bills of lading were presented. The FBOL Clause of plaintiffs' policy covers these losses.

F. Affiliated's contention that the Affiliated Policy required existing cargo is contrary to the plain, unambiguous language of the FBOL clause.

G. While this Court finds no relevant ambiguity in the Affiliated Policy, were there any such ambiguity, it would be construed against the insurer.

H. Coverage exists for the Banks under the Affiliated Policy as additional assureds under both the "for account of whom it may concern" clause and the Bankers' Endorsements issued to each Bank.

I. This Court having found that no plaintiff had actual knowledge of the fraud, Affiliated's contention that each plaintiff should have known of the fraud being perpetrated has no legal merit. As a matter of law, insurance coverage is avoided where an insured intends to cause its loss, but not where its negligence (ordinary or gross) causes the loss. Thus, it is not sufficient for Affiliated to prove that a plaintiff

"should have known" of the exporter's fraud; to avoid liability it must prove that the plaintiff actually knew of the falsity of the truck bills of lading and nonexistence of the coffee at the time the relevant letters of credit were drawn upon and paid.

J. Affiliated's contentions that bills of lading should have been "title" documents, or that Colombian export documents such as a "Revision," "Guia," "Orden de Cargue," "Registro de Contracto" would have avoided the possibility that a beneficiary would draw with knowingly false truck bills of lading (nonexistent coffee) are defeated by the provisions of the Affiliated Policy, which do not require these documents for coverage under the FBOL Clause or otherwise.

K. Affiliated's contention that plaintiffs must prove actual reliance upon the draw documents is without merit because the FBOL Clause requires only that the losses be caused (*i.e.*, "occasioned") by the acceptance of fraudulent truck bills of lading, not that such documents be relied upon. Even though reliance upon the truck bills of lading was not required as a matter of law, the acceptance of the truck bill of lading and its use by each Bank to confirm the existence of the coffee and the commencement of the export cycle demonstrates reliance by each Bank on the fraudulent truck bills of lading.

L. This Court having found no credible evidence that Andina knew of or participated in the fraud or of the creation and use of false documents by Ruben Echeverri and the Gonche Group, no conduct of Andina is a defense to any claim asserted by plaintiffs. Where an insurer asserts

an affirmative defense based on the "conversion, misappropriation or other dishonest acts committed by or on behalf of the named Assured," it must prove the defense by a preponderance of the evidence; here Affiliated did not establish this affirmative defense by a preponderance of the credible evidence presented to the Court thereon.

M. This Court having found that no Bank knew of or was privy to or participated in fraud, each Bank is an innocent co-assured entitled to coverage under the Affiliated Policy.

N. Each of the plaintiffs timely complied with the notification and documentation requirements under the Affiliated Policy with respect to its claim of loss. Further, under New York law, clauses in insurance policies requiring "immediate notice" to the insurer are construed to require notice within a reasonable time after a duty to give notice has arisen.

O. Notice and proof requirements are liberally construed in favor of the assured and merely require substantial, not strict, compliance.

P. This Court having found that each plaintiff acted in good faith in connection with these claims, the doctrine of *uberrimae fidei*, pursuant to which parties to a marine insurance contract owe each other the utmost degree of good faith, is not implicated. Moreover, it does not apply here because the claims made arose under inland risks, not marine risks.

Appendix C

Q. This Court having found that there is no dispute that the Affiliated Policy was canceled as to the interests of Andina with respect to shipments on or after February 25, 1986, but that separate endorsements to the Policy expressly provided that each Bank is entitled to 10 days' prior notice of cancellation and such notice was first given to some Banks on March 11, 1986, the earliest cancellation date of the Affiliated Policy as to the interest of any Bank was with respect to shipments on or after March 21, 1986.

R. T&N had no express, implied, or apparent authority to cancel the Bank's insurance coverage or to waive the right of any Bank to notice of cancellation stipulated in the insurance policy.

S. As a matter of law, replacement of an insurance policy does not automatically result in cancellation of that policy, and cancellation provisions of the earlier policy must be followed. Moreover, the Affiliated Policy explicitly provides in clause 15 thereof, that it remains in force if a subsequent policy attached to the same interest.

T. The doctrine of ratification involves a party's subsequent authorization of an unauthorized act undertaken on behalf of the party. Here, in view of the absence of any evidence that T&N purported to act on behalf of any Bank with respect to cancellation or replacement of the Affiliated Policy, there was no unauthorized act which could be the subject of a subsequent ratification by any Bank.

U. Since no Bank knew of the losses that had occurred prior to August 1986, and no Bank knew that London Insurers

had a defense based on non-disclosure which permitted the London Policy to be avoided *ab initio*, no Bank effectively ratified the alleged agreement between T&N and Affiliated to cancel the Affiliated Policy as of February 25, 1986. An invalid or defective cancellation will not become effective by ratification where the insured does not have full knowledge of its rights and all material facts, including that losses had occurred or that a purported "substitute" insurer (here London Insurers) would later deny attachment of its policy.

V. Endorsement No. 9 to the London Policy did not alter the Affiliated Policy, nor did it affect any of Affiliated's obligations to the plaintiffs under the Affiliated Policy. Moreover, a party to a contract cannot relieve itself of obligations under a contract without the express consent of the other party to that contract. Thus, because the plaintiffs were unaware of Endorsement No. 9 until after the discovery of the fraud in August 1986, any agreement among Affiliated and the London Insurers relating to Endorsement No. 9 does not affect Affiliated's obligations to the plaintiffs under the Affiliated Policy.

W. As to each of the Banks, the Affiliated Policy covered shipments or purported shipments occurring on or before March 21, 1986. As to Andina, the Affiliated Policy covered shipments or purported shipments occurring before February 25, 1986. Each of the losses claimed in this matter relates to purported shipments on or before March 21, 1986 for the Banks and before February 25, 1986 for Andina. Consequently, each loss is covered by the Affiliated Policy.

Appendix C

X. This Court having found that the plaintiffs paid money at the time of acceptance of the fraudulent documents the time of each insured loss is the time that such money was paid. Where a party is induced to pay money on the basis of fraudulent documents, a loss occurs at the time the money is paid out, not when the party discovers the fraud.

Y. Loss occurs under a transportation or cargo policy when an insured peril causes harm to the interest insured, and not when the loss is discovered or manifest.

Z. Affiliated's contentions concerning the Banks' compliance with the law or practices governing documentary letters of credit is not relevant in determining whether there is a covered loss under the Affiliated Policy. Even if the Banks had a duty to Affiliated to comply with the law or practices governing documentary letters of credit, the Banks did comply.

AA. The plaintiffs are entitled to pre-judgment interest at the rate of 9% per annum from January 1, 1987 to the date of entry of judgment hereon. Pre-judgment interest at the statutory rate of 9% per annum from January 1, 1987 to the date of entry of judgment is mandatory. Even if this Court had discretion concerning interest, such as under the law of New Jersey, the Second Circuit has held in a similar case that interest be awarded.

BB. This Court having found that plaintiffs' losses occurring on and after March 21, 1986 have not been fully recovered from other sources, the plaintiffs are permitted to allocate all third-party recoveries to losses after March 21,

1986. As a matter of law, an insured must be made whole before an insurer is entitled to receive credit for any portion of the insured's recoveries.

CC. This Court having found that before (and after) the discovery of the fraud, each of the Banks entered into a contractual agreement with Andina which provided that each of the Banks had the right to apply recoveries in any manner they selected, the allocations of recoveries made by the Banks are permitted by law. Quite apart from the contractual agreements that authorized each Bank to apply recoveries in any manner it selected, the law provides that a debtor owing a creditor more than one debt has the right to direct how a payment shall be applied. Where the debtor fails to make such direction, the creditor may apply the payment as it deems fit.

DD. A debtor and creditor are free to agree to a particular allocation at the time of payment or later, and free to reallocate payments after a particular allocation has been made.

EE. The right of the debtor and creditor to make a particular allocation or reallocation is not affected by third parties, who generally have no standing to protest.

FF. Under New York law, the right of the debtor and creditor to specify an allocation does not cease when litigation is commenced; rather, an allocation may be made at any time until a court has ordered one.

Appendix C

GG. Quite apart from the rule of law that an insured must be made whole before an insurer may share in subrogation, and even if the agreements of the parties on allocation were not controlling, the plaintiffs are still at liberty to allocate their recoveries to the period of the London Policy, because the London Insurers have settled and been released. As between the London Insurers (who may no longer be pursued as an avenue of recovery and) who had a defense that their policy was void *ab initio*, on the one hand, and Affiliated, which makes no such assertion as to its policy on the other hand, the London Policy is least secure.

HH. Affiliated seeks to take advantage of certain Banks' internal bookkeeping entries which caused a portion of Andina's obligations, or interest accruing thereon, to be removed as an asset from the Banks' books. The practice of writing off or writing down a debt has no bearing, however, on a bank's right to collect those amounts. Moreover, the contractual agreements of the parties not only permitted, but required, the application of recoveries to interest.

II. The Banks properly applied certain recoveries to interest, with the surplus, if any, to the principal on a *pro tanto* basis.

JJ. Ruben Echeverri's dishonesty in defrauding the Banks cannot be imputed to Andina so as to bar recovery under the Affiliated Policy.

KK. The Banks have proved that from January 13, 1986 through March 21, 1986, the latter being the earliest date the defendant's policy could have been cancelled under the

terms thereof, as to the Banks, they advanced and paid a total of $44,174,000 to Gonchecol against fraudulent truck bills of lading covering coffee that did not exist, which were presented to the Banks for payment under letters of credit which the Banks had issued. None of the plaintiffs actually knew of the nonexistence of the coffee when the relevant letters of credit were drawn upon and paid.

LL. The Bankers' Endorsements' "non-impairment" and "no dishonest acts" clauses do not contradict one another: 1) the "non-impairment" clause expressly addresses the interest of each Bank and provides that each of the Bank's interest shall not be impaired or invalidated by any act or neglect or breach of warranty or condition by Andina; and 2) the "no dishonest acts" clause refers to Andina's rights under the policy in light of the Bankers' Endorsements, and makes it clear that the Endorsement does not extend Andina's coverage under the policy to cover additional risks. However, even if the "non-impairment" and "no dishonest acts" clauses were in conflict with each other, the conflict would be resolved against Affiliated, the drafter of the policy, and the former clause (i.e., the "non-impairment" clause) would supersede the latter (i.e., the "no dishonest acts" clause).

MM. The plaintiffs herein are entitled to recover judgment in their favor and against the defendant with pre-judgment interest as aforesaid to be added by the Clerk to the following principal awards:

Appendix C

Plaintiff	**Amount**
Chemical Bank	$14,860,000
Banque Paribas	14,392,500
American Express Bank Ltd	7,049,500
NatWest Bank N.A.	5,762,000
Rabobank Nederland	1,620,000
European American Bank	490,000
Andina Coffee, Inc.	2,975,000

Counsel should submit a proposed calculation to the Clerk of the Interest allowed.

The foregoing Opinion and Findings together with the Additional Specific Findings and Conclusions shall constitute the Findings of Fact and Conclusions of Law required by Fed. R. Civ. P. 52(a).

SO ORDERED.

Dated: July 18, 1997

MILTON POLLACK
Senior United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 24, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24 day of July two thousand.

Dkt No: 97-7982

Chemical Bank, et. al,

Plaintiffs-Appellees,

v

Affiliated FM Ins.,

Defendant-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Affiliated FM Insurance Co. and amicus curiae American Insurance Association.

Appendix D

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

BY: s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

Supreme Court, U.S.
FILED
NOV 2 2 2000
CLERK

(2)

No. 00-659

In The

Supreme Court of the United States

AFFILIATED FM INSURANCE CO.,

Petitioner,

v.

CHEMICAL BANK, EUROPEAN AMERICAN BANK, BANQUE PARIBAS, AMERICAN EXPRESS BANK LTD., NATWEST BANK N.A., RABOBANK NEDERLAND, ANDINA COFFEE, INC. and ANDINA TRADING CORP.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit Court of Appeals violated petitioner's right to appeal, federal appellate procedure, due process and fundamental fairness when it did not specifically mention in its opinions every argument raised on appeal?

2. Whether the fact that the Second Circuit Court of Appeals specifically mentioned some but not all of the petitioner's arguments in its opinions conflicts with decisions of this Court or of other circuits?

RULE 29.6 STATEMENT

Respondent Chemical Bank, now known as The Chase Manhattan Bank, is a banking corporation organized and existing under the laws of the State of New York. The Chase Manhattan Bank is a subsidiary of The Chase Manhattan Corporation and The Chase Manhattan Corporation has issued shares to the public.

Respondent American Express Bank Ltd., formerly known as American Express International Banking Corporation, is a Connecticut corporation and is a wholly owned indirect subsidiary of American Express Company. American Express Company has issued shares to the public.

Respondent NatWest Bank, now known as Fleet National Bank, is a wholly owned subsidiary of FleetBoston Financial Corporation, which has issued shares to the public.

Respondent Banque Paribas, now known as BNP Paribas, has no corporate parents or subsidiaries which are publicly held. Although BNP Paribas is publicly traded abroad, there are no institutional holders or publicly held companies, in the United States or elsewhere, which possess a 10% or greater interest in its stock.

Respondent Cooperative Centrale Raiffeisen-Boorleenbank B.A., also known as Rabobank, has no corporate parents or subsidiaries which are publicly held. In addition, there are no institutional holders or publicly held companies, in the United States or elsewhere, which possess a 10% or greater interest in its stock.

RULE 29.6 STATEMENT – Continued

Respondents Andina Coffee, Inc. and Andina Trading Corp. are New York corporations. Neither Andina Coffee, Inc. nor Andina Trading Corp. has issued shares to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 2

A. The Relevant Facts 2

B. Course of Proceedings 7

C. The Trial 10

D. The Second Circuit's Decisions 11

SUMMARY OF ARGUMENT 14

REASONS FOR DENYING THE WRIT 16

1. The Second Circuit's decision is in accord with traditional appellate practice and does not implicate the final judgment rule 16

   a. Traditional appellate practice frequently entails the resolution of issues without opinions or writings on the merits 16

   b. The Second Circuit fully exercised its jurisdiction after the district court entered a final judgment 19

2. No conflict exists between the proceedings below and other caselaw 20

   a. No conflict exists between the proceedings below and this Court's "teachings" 20

   b. No conflict exists between the proceedings below and other courts of appeal 23

TABLE OF CONTENTS – Continued

Page

3. Affiliated failed to present fairly to the Second Circuit the Constitutional and procedural appellate practice issues raised in this petition..... 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 25

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 25

Auer v. Robbins, 519 U.S. 452 (1997) 25

Benton v. Maryland, 395 U.S. 784 (1969) 21, 22

Chemical Bank v. Affiliated FM Ins. Co., 815 F. Supp. 115 (S.D.N.Y. 1993) 7

Chemical Bank v. Affiliated FM Ins. Co., No. 87 Civ. 1050, 1994 WL 31413 (S.D.N.Y. Jan. 25, 1994) 8

Coleman v. Thompson, 501 U.S. 722 (1991) 18

Furman v. United States, 720 F.2d 263 (2d Cir. 1983) 17, 20

Gelb v. Royal Globe Ins. Co., 798 F.2d 38 (2d Cir. 1986) 18

Harris v. Rivera, 454 U.S. 339 (1981) 18

Jones v. United States, No. 88 Civ. 3999 (MJL), 1990 WL 6566 (S.D.N.Y. Jan. 24, 1990), *aff'd*, 918 F.2d 9 (2d Cir. 1990) 17, 20

Kairys v. I.N.S., 981 F.2d 937 (7th Cir. 1992) 17

Lego v. Twomey, 404 U.S. 477 (1972) 18

Mainiero v. Jordan, 105 F.3d 361 (7th Cir. 1997) ...17, 20

N.L.R.B. v. Deena Artware, Inc., 361 U.S. 398 (1960) 22

Reed v. Federal Ins. Co., 71 N.Y.2d 581, 523 N.E.2d 480, 528 N.Y.S.2d 355 (1988) 8

State v. Waste Management of Wis., Inc., 261 N.W.2d 147 (Wis. 1978) 20

TABLE OF AUTHORITIES – Continued

Page

Strickler v. Greene, 527 U.S. 263 (1999) 16

Sumner v. Mata, 449 U.S. 539 (1981) 18, 19

Taylor v. McKeithen, 407 U.S. 191 (1972) 17, 19

Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1984), *vacated on rehearing en banc, Tucker v. Kemp*, 762 F.2d 1496 (11th Cir. 1985) 23

Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985) 23

United States v. Chemical Found., 272 U.S. 1 (1926) 16

United States v. Garza, 165 F.3d 312 (5th Cir.), *cert. denied*, 120 S. Ct. 502 (1999) 17, 19

United States v. Jones, 763 F.2d 518 (2d Cir. 1985) 17

United States v. Patel, 879 F.2d 292 (7th Cir. 1989) 20

United States v. United Continental Tuna Corp., 425 U.S. 164 (1976) 21

United States v. Wilson, 420 U.S. 332 (1975) 21

W.L. Gore & Associates, Inc. v. International Medical Prosthetics Research Assocs., Inc., 975 F.2d 858 (Fed. Cir. 1992) 23, 24

Wood v. Strickland, 420 U.S. 308 (1975) 21

RULES

Fed. R. App. P. 36 17

2d Cir. R. § 0.23 17

S. Ct. R. 18.12 17

RESPONDENTS' BRIEF IN OPPOSITION

After ten years of pre-trial proceedings, this case was transferred to the Honorable Milton Pollack, Senior United States District Court Judge, who promptly held a four week trial and ruled that the losses incurred by the Respondents[1] as a result of the acceptance of fraudulent documents were covered under an insurance policy issued by Petitioner Affiliated FM Insurance Co. ("Affiliated" or Petitioner). Affiliated appealed this judgment to the United States Court of Appeals for the Second Circuit (the "Second Circuit"), raising numerous arguments, including the seven it now assumes were ignored. Initially, the Second Circuit reversed the trial court's decision. After Respondents petitioned for rehearing, the Second Circuit invited Affiliated to reply to the petition, which it did, again raising the points it now assumes were ignored. The Second Circuit vacated its prior decision, affirmed in part and vacated in part the original

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[1] The Respondents are: Chemical Bank (now known as The Chase Manhattan Bank) ("Chemical"), Banque Paribas (now known as BNP Banque Paribas) ("Paribas"), American Express Bank Ltd. (formerly known as American Express International Banking Corporation) ("Amex"), NatWest Bank N.A. (successor in interest to National Westminster Bank USA; now known as Fleet National Bank) ("NatWest"), Cooperative Centrale Raffeisenboerenleenbank B.A., New York Branch (also known as Rabobank Nederland) ("Rabobank"), (collectively Chemical, Amex, Paribas, NatWest and Rabobank, the "Banks"), and Andina Coffee, Inc. and its subsidiary Andina Trading Corp. (collectively, "Andina," and together with the Banks, the "Respondents"). In the proceedings below, European American Bank ("EAB") sued Affiliated. That lawsuit has now been dismissed and EAB is not seeking appellate review of the dismissal.

judgment and remanded to the district court to recalculate damages. Affiliated then petitioned for rehearing, again raising the seven arguments. Affiliated's petition was denied by the panel, and no active judge requested that a vote be taken to hear the case *en banc*.

Affiliated now comes before this Court seeking a writ of certiorari, claiming it was deprived of its procedural and Constitutional rights because not all of its arguments were specifically mentioned by the Second Circuit in its opinions. Affiliated, however, has failed to satisfy any of the tests set forth in Supreme Court Rule 10 or to offer any other compelling reason why this Court should exercise its discretion and review the decision of the Second Circuit. Respondents therefore respectfully submit that the petition should be denied.

STATEMENT OF THE CASE

A. The Relevant Facts

The Parties and their Commercial Dealings. Andina was an importer of Colombian coffee. Each of the Banks extended separate secured lines of credit to Andina to finance its purchases of coffee from Colombian exporters, including Gonchecol Ltda. ("Gonchecol"). Ruben Echeverri ("Echeverri") was a principal officer of Gonchecol.[2] Andina and the Banks had

[2] Echeverri held a minority interest in one of three Panamanian corporations, which in turn owned the stock of Andina. Other members of the Echeverri family and members of two other Colombian families, who were engaged in the coffee

always believed the Echeverris to be a leading Colombian family, well regarded in the political and business communities.

Between 1974 and 1986, the Banks and other financial institutions extended hundreds of millions of dollars of credit to Andina pursuant to letter of credit transactions of the type involved in this action. These obligations (other than the losses at issue here) were timely repaid.

Each letter of credit provided that the Colombian exporter, as beneficiary, could obtain payment from the Bank by presenting certain draw documents (the "Draw Documents"), including truck bills of lading ("TBOLs").[3] The TBOLs represented that the coffee existed, that the trucker had assumed responsibility for the transportation of the coffee and that the export cycle had commenced. Each Bank's letter of credit department independently serviced its own letter of credit transactions, determined whether the Draw Documents conformed to the letter of credit terms, and thereafter accepted the TBOLs and other Draw Documents and paid the Colombian exporter. Each letter of credit draw resulted in a reimbursement

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business, owned shares in the Panamanian corporate shareholders of Andina. Echeverri family members did not participate in the management of Andina's day-to-day operations and never constituted a majority of its board.

[3] For a more detailed description of the coffee exportation process, see Judge Pollack's description in footnote 18 of the findings of fact, appended to Affiliated's petition for a writ of certiorari ("Pet. App."). Pet. App. 34a-35a.

obligation on the part of Andina to the issuing Bank, which Andina would typically repay once it had sold the coffee.

The Affiliated Policy. As a condition of the extension of financing, each Bank required Andina to maintain suitable insurance covering Andina's interests and the interest of the Bank. To satisfy this requirement, Andina obtained from Affiliated an insurance policy dated July 23, 1980 (the "Policy" or the "Affiliated Policy"), which included fraudulent document coverage under a separate typewritten Special Condition (the Fraudulent Bill of Lading Clause or "FBOL Clause").[4] The Policy insured Andina and, pursuant to Clause 2 thereof, the interests of "whom it may concern," including the Banks. Each Bank was also named in the Policy as an additional insured in separate endorsements entitled "Special Terms and Conditions" (the "Bankers' Endorsements"). The Banks and Andina relied upon the Policy, including the FBOL Clause.

In mid-1985, Affiliated decided to discontinue various policies, including the Affiliated Policy, and contacted Andina's insurance broker, Trinder & Norwood ("T&N") to request that replacement coverage be obtained. A cancellation notice, dated November 27, 1985, was sent to T&N, but not to Andina or to any Bank. Because T&N preferred not to market the Andina account

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[4] The FBOL Clause states: "38. (D) This policy covers loss or damage occasioned through the acceptance by the Assured and/or their agents or shippers of fraudulent Bills of Lading and/or shipping receipts and/or messenger receipts and/or warehouse receipts and/or truckmen's receipts."

under a notice of cancellation, it asked Affiliated to rescind the notice, and Affiliated agreed. T&N then undertook to find a replacement policy as soon as possible. Respondents did not learn of these events until after this litigation commenced.

On February 25, 1986, T&N obtained from certain Lloyds syndicates and other companies in the London market (the "London Insurers") a cover-note for a new policy (the "London Policy") purportedly "effective with all shipments made on/or after February 25, 1986."

At Affiliated's request, on April 22, 1986, the London Insurers issued Endorsement No. 9 to the London Policy. The discussions among Affiliated, T&N, and the London Insurers with respect to Endorsement No. 9 are referred to by Affiliated as the "April Agreement." Affiliated asserted at trial that this endorsement shifted coverage for the Fraudulent Document Losses to the London Insurers. The district court and the Second Circuit rejected Affiliated's argument.

Discovery of the Fraud. In the Spring of 1986, Gonchecol faced a cash flow problem, which it advised Andina's Board of Directors was temporary and resolvable. Echeverri assured Andina's Board that Gonchecol would continue to fulfill all its commitments. In the summer of 1986, Andina noticed a marked elongation in the export cycle, and meetings were held with the Banks to discuss Gonchecol's cash flow problems.

In August 1986, officers from Andina and Amex separately traveled to Colombia to investigate delays in coffee shipments financed by the Banks. On August 14, 1986, representatives of the Banks and Andina met in New

York to discuss the delays. During the meeting, the Andina and Amex officers telephoned from Colombia and informed the group that approximately 200,000 bags of Bank-financed coffee could not be located. On August 19, 1986, at a meeting in Colombia with representatives of three of the Banks, Echeverri admitted that the TBOLs presented to the Banks between December 1985 and July 1986 were fraudulent in that the coffee described therein was not in the possession or control of either the trucker or port forwarder, but was "missing." The district court determined that no Respondent knew of or participated in the fraud.

As a result of the acceptance of the fraudulent TBOLs in New York and payment of the corresponding letters of credit, the Banks and Andina incurred losses (the "Fraudulent Document Losses") in the tota! principal amount of $94,598,368.

Bank representatives met and spoke with Affiliated representatives, requested forms of proofs of loss, offered to make Bank employees available for interviews and urged Affiliated to appoint a surveyor to investigate the losses. Affiliated rejected all these requests and offers. Respondents timely filed written proofs of loss with Affiliated. No Affiliated witness testified at trial that Respondents withheld or concealed any information or facts from Affiliated concerning their losses. Affiliated did not pay Respondents' claims and did not reject the claims until it filed its answers to the complaints.

In 1994, Echeverri was arrested in Miami, Florida, and in 1995 he pleaded guilty to two counts of bank fraud

for defrauding the Banks. *United States v. Echeverri*, 94 CR 92 (JFK) (S.D.N.Y. 1994).

B. Course of Proceedings

Beginning in January 1987, Respondents commenced separate actions against Affiliated and the London Insurers asserting claims under the Affiliated Policy and the London Policy for losses arising from the Banks' acceptance of fraudulent TBOLs. Because the London Insurers asserted that the London Policy was void *ab initio* by reason of alleged broker non-disclosures, Respondents also sued the brokers which obtained the London Policy. The federal actions were initially assigned to the late Senior District Judge Broderick (and a magistrate judge) and were consolidated for discovery and then for all purposes. In January 1993, Respondents' claims against the London Insurers and against the brokers were settled without determination as to whether the London Policy was validly issued.

The FBOL Decision. Affiliated's principal defense was that the Policy did not cover losses resulting from the acceptance of fraudulent TBOLs describing nonexistent coffee. The district court (Broderick, D.J.) held that the Policy "was not ambiguous" and that the FBOL Clause "provided coverage" for losses arising from the acceptance of fraudulent TBOLs "concerning what turned out to be nonexistent coffee shipments." *Chemical Bank v. Affiliated FM Ins. Co.*, 815 F. Supp. 115, 116 (S.D.N.Y. 1993) (the "FBOL Decision"). The district court also ruled that the Banks' losses were covered pursuant to the "of whom

it may concern" clause of the Policy, because the Banks had an insurable interest under the Policy.

The Innocent Coinsured Decision. In an effort to defeat coverage as to the Banks, Affiliated then alleged that Andina participated in the fraud. However, the district court (Broderick, D.J.) determined that under New York's innocent coinsured doctrine, Andina's purported wrongdoing was not a defense to the Banks' claims. *Chemical Bank v. Affiliated FM Ins. Co.*, No. 87 Civ. 1050, 1994 WL 31413 (S.D.N.Y. Jan. 25, 1994) (the "Innocent Coinsured Decision"). *See also Reed v. Federal Ins. Co.*, 71 N.Y.2d 581, 523 N.E.2d 480, 528 N.Y.S.2d 355 (1988).

Pre-Trial Discovery. The parties conducted extensive pre-trial discovery for nearly a decade during which hundreds of thousands of documents were produced, over 2,600 deposition exhibits were marked, and 74 witnesses were deposed for over 300 days. On April 26, 1994, the magistrate judge entered an order establishing a schedule for completion of discovery. An agreed amendment to that Order further directed that remaining depositions of trial witnesses be held in New York prior to trial.

Affiliated's amended list of 75 trial witnesses included Luis and Jorge Echeverri. The Banks sought to depose the Echeverris. Neither would appear in the United States for deposition or trial and therefore the magistrate judge, by Order dated December 13, 1994, precluded Luis and Jorge Echeverri from testifying at trial. Affiliated did not appeal the order, but nevertheless sought to add Luis and Jorge Echeverri to its witness list in October 1995. The district court ruled that Affiliated

could do so only if the Echeverris came to the United States to be deposed and testify, and precluded testimony by satellite transmission from Colombia. The district court further ordered that if they did not appear for deposition, they would not be permitted to testify at trial. Neither Luis nor Jorge Echeverri appeared in the United States for deposition or trial.

Affiliated's Pretrial Conduct. After the FBOL and Innocent Coinsured decisions, Affiliated focused its defense on its allegation that Andina *and* the Banks participated in the fraud. At trial, Judge Pollack found that "as part of its casting about for a defense strategy" and in its efforts to "concoct a defense to the Banks' claims":

> Affiliated engaged in secret, questionable negotiations to induce Ruben Echeverri and his brothers, Luis and Jorge Hernan, to impute to the Banks and Andina knowledge of and participation in the fraud. Affiliated's pretrial strategy . . . at a minimum casts doubt on the management's integrity in its attempt to find a cognizable defense.

Pet. App. 52a. Affiliated's attorneys acknowledged that they and other Affiliated representatives had extensive, clandestine contacts with the Echeverris in Colombia, Panama and Key Biscayne, Florida and prepared and obtained statements charging Respondents with knowledge of the fraud. At deposition, however, Echeverri testified that he repeatedly informed Affiliated that the Banks did *not* know of the fraud prior to mid-August 1986 and that he nevertheless was asked by Affiliated to sign statements to the contrary. Echeverri further testified

that Affiliated's representations persuaded him to provide false statements in order to obtain immunity from criminal prosecution in the United States.[5]

After obtaining the Echeverri statements, Affiliated's counsel destroyed verbatim stenographic transcripts of two meetings with Echeverri and his brothers.

C. The Trial

Following a four-week bench trial of these cases, on July 18, 1997, District Court Judge Pollack issued a detailed decision, which clearly and completely set forth its factual findings and conclusions of law. The trial included live testimony by twenty witnesses, including officers responsible for the Andina account at each Bank during 1985 and 1986, two employees of T&N, and Affiliated's underwriter, as well as Echeverri's six-day videotaped deposition. Documentary evidence, consisting of hundreds of trial exhibits and the deposition testimony of twenty-four additional witnesses, also was submitted. The parties further submitted bench memoranda marshalling evidence on certain key issues, pre-trial and post-trial proposed findings of fact and conclusions of law containing extensive citations to the record and case law, and statements in lieu of summation.

The district court resolved all of the legal and factual issues raised by Affiliated in favor of the Respondents.

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[5] Echeverri, who was subject to arrest in the United States, also testified that he was advised by Affiliated's counsel to remain in Colombia.

D. The Second Circuit's Decisions

Affiliated's appeal to the Second Circuit raised many arguments, including the seven points noted in the Petition. Pet. 6-8. In its original opinion, decided February 25, 1999, the Second Circuit acknowledged these points, but focused on the only issues that warranted attention, stating:

> Affiliated makes *several claims of error* on appeal, but the dispositive issue is whether the Banks are bound by T&N's cancellation and replacement of the Affiliated Policy on February 25, 1986, and by T&N's subsequent April Agreement allocating the respective liabilities under the Affiliated and London policies.

Pet. App. 17a-18a (emphasis added). The Second Circuit held that Respondents were bound by T&N's cancellation on February 25, 1986, because they effectively ratified the cancellation by their subsequent actions. Pet. App. 22a-25a. Furthermore, the Second Circuit held that because T&N had "apparent authority" to enter into the so-called April Agreement, Respondents were also bound by its allocation of liabilities. Pet. App. 26a-28a. Accordingly, it reversed the district court's judgment.

Respondents filed a petition for rehearing *inter alia* pointing out that the Second Circuit had overlooked certain provisions of the Affiliated Policy. Those provisions provided insurance coverage to the Respondents, notwithstanding the so-called April Agreement.

In opposition to Respondents' petition for rehearing, in addition to responding to these arguments, Affiliated again specifically set forth the seven arguments it now

says were ignored by the Second Circuit. None of these arguments has merit. These arguments were rejected by the district court for the following reasons:

1. *The Draw Documents.* The Draw Documents conformed to the Banks' letters of credit, the TBOLs were not "future-dated," and the dates on the TBOLs were included only for purposes of determining staleness.

2. *Awareness of Fraud.* The Draw Documents, delays in delivery, and Andina's request for additional time for repayment did not alert any of the Banks to the existence of fraud.

3. *Extent of FBOL Clause Coverage.* As determined in the FBOL Decision (and affirmed by District Court Judge Pollack after the trial), the Affiliated Policy was unambiguous and covered losses arising from nonexistent coffee shipments.

4. *Date of Loss.* The coffee did not exist when each fraudulent TBOL was accepted by the Banks, and the Banks' insured losses occurred at that time.

5. *Limitations on Liability.* Each acceptance of fraudulent bills of lading constituted a loss and no such acceptance exceeded the $8 million "any one place at any one time" limit. The limitations on accumulation of interests " . . . by reason of any interruption of transit . . . or by any reason of casualty" did not apply to the Fraudulent Document Losses because there was no interruption of transit and no casualty. Moreover, each Bank's aggregate claims were within the limitation amount.

6. *Duty of Good Faith.* Respondents acted in good faith and the maritime law concept of *uberrimae fidei* was not violated. Moreover, this precept of maritime law was not implicated because these land risks were governed by the substantive law of New York.

7. *Preclusion of Testimony by Satellite.* This was a discretionary decision made independently and pursuant to separate applications to the magistrate judge as well as two district court judges. The magistrate judge precluded Luis and Jorge Echeverri from appearing on Affiliated's witness list, and the district court barred their addition to the witness list unless they could be deposed by Respondents in the United States. The use of satellite depositions in Colombia, which violated Colombian law, was rejected. The district court also refused to admit into evidence Luis and Jorge Echeverris' self-serving, hearsay affirmations, and explicitly discredited Ruben Echeverri's videotaped testimony based upon the credible testimony of other witnesses and Affiliated's dealings with the Echeverris.

The panel reversed itself on November 8, 1999, candidly stating: "we failed to note, or at least perceive the implications of, the fact that the April Agreement did not even purport to narrow the coverage of the Affiliated Policy." Pet. App. 5a. Because Affiliated remained fully liable for losses incurred before the effective termination date of the Affiliated Policy, February 25, 1986, the Second Circuit vacated its original disposition, affirmed the judgment in favor of Andina, and remanded to the district court to recalculate each Bank's damages and enter a corresponding judgment.

On November 29, 1999, Affiliated sought rehearing and rehearing *en banc* on both the April Agreement issue and on the seven "ignored" arguments. On July 24, 2000, the Second Circuit denied rehearing. No judge even requested that a vote be taken for *en banc* review. Pet. App. 98a-99a. The Second Circuit promptly denied Affiliated's motion to stay the mandate pending a petition for certiorari to this Court. On August 17, 2000, Justice Ginsburg denied Affiliated's application for a stay of the Second Circuit's mandate pending a petition for certiorari to this Court.

SUMMARY OF ARGUMENT

Further review of this case is not warranted. Affiliated cites the proposition that an appellate court should decide all arguments which properly have been presented and which require resolution in order to dispose of the appeal. Affiliated then leaps to the conclusion that if there is not a specific mention of each argument, or a ritualistic declaration that all arguments are "without merit," the appellate court has failed to consider all arguments and has thereby deprived the appellant of its Constitutional right to due process and violated federal appellate procedure. No case supports this claim, nor does any principle of law or appellate practice, directly or by analogy, support inferring such a right or procedural

requirement. Affiliated has no basis for its assertion that the Second Circuit failed to consider its arguments.[6]

Respondents' arguments in opposition are threefold.

First, traditional appellate practice is consistent with – not contrary to – the Second Circuit's handling of this case. Moreover, the final judgment rule does not require that each of an appellant's arguments be separately, specifically mentioned.

Second, Affiliated's contention that a conflict exists between the Second Circuit's actions and other decisions is baseless. The cited authority stands for no more than the desirability of a higher court remand to allow a lower court to determine previously unaddressed issues which first become relevant because of the higher court's ruling.

Third, Affiliated's arguments that its right to appeal, accepted federal appellate procedure, due process, and fundamental fairness have been violated were never fairly presented to the Second Circuit. The questions presented thus should not be considered.

Affiliated has failed to present any "compelling reason" of the type enumerated in Supreme Court Rule 10 which would warrant the granting of its petition for a writ of certiorari. This petition should be denied.

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[6] Affiliated devotes a substantial portion of its petition to attempting to show that there is some shred of merit to its seven arguments. Pet. at 12-15. Whether any support for its positions exists is irrelevant to this petition, however, because the Second Circuit decided the appeal fully. Affiliated is not seeking review of the merits of any of these arguments.

REASONS FOR DENYING THE WRIT

1. The Second Circuit's decision is in accord with traditional appellate practice and does not implicate the final judgment rule.

a. Traditional appellate practice frequently entails the resolution of issues without opinions or writings on the merits.

Despite Affiliated's protestations, the Second Circuit fully decided its appeal. The judgment was vacated and remanded to the district court for recalculation of the damages in accordance with the Second Circuit's decision. In so doing, the Second Circuit necessarily decided all of the issues raised by Affiliated. Traditional appellate practice does not require mention of all arguments an appellant has made. In fact, Affiliated's assertion that the Second Circuit did not even consider its argument is pure speculation and contrary to the general presumption that no official or person acting under an oath of office acts contrary to his or her official duty, or omits anything which his or her official duty requires to be done. *See Strickler v. Greene*, 527 U.S. 263, 286 (1999) (presumption that official acts are properly discharged); *United States v. Chemical Found.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

First, citing no authority, Affiliated asserts that courts of appeals have a duty to state that an appellant's arguments not specifically discussed are "without merit."

Affiliated admits, however, that appellate courts frequently focus on one or two issues without writing opinions explaining their rejection of other points. Pet. at 12, 16. Indeed, it is accepted appellate practice that an appellant does not have a right to a written opinion on every point raised. *See United States v. Garza*, 165 F.3d 312, 314 (5th Cir.) (holding that a "litigant's right to have all issues fully considered and ruled on by the appellate court does not equate to a right to a full written opinion on every issue raised"), *cert. denied*, 120 S. Ct. 502 (1999); *Mainiero v. Jordan*, 105 F.3d 361, 365 (7th Cir. 1997) (" 'procedural fairness does not require an appellate court to discuss every issue raised by an appellant' ") (*quoting Kairys v. I.N.S.*, 981 F.2d 937, 940 (7th Cir. 1992)); *Furman v. United States*, 720 F.2d 263, 264-66 (2d Cir. 1983). Similarly, where a court of appeals notes that "[a]ppellants raise a number of claims, only two of which require discussion," *United States v. Jones*, 763 F.2d 518, 520 (2d Cir. 1985), a district court will reject collateral challenges to the unmentioned arguments. *See Jones v. United States*, No. 88 Civ. 3999 (MJL), 1990 WL 6566, at *3 and n.6 (S.D.N.Y. Jan. 24, 1990), *aff'd*, 918 F.2d 9 (2d Cir. 1990) ("Yet by its preliminary remarks, we may presume that [the court of appeals] considered those claims so lacking in merit as to be unworthy of discussion.").

In fact, the duly adopted rules of procedure and this Court have repeatedly affirmed that courts of appeals have wide discretion to decide whether and how to write their own opinions. *See* Fed. R. App. P. 36; S. Ct. R. 18.12; 2d Cir. R. § 0.23 (permitting summary disposition of appeals); *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (acknowledging that the courts of appeals have "wide

latitude in their decisions of whether and how to write opinions"); *Sumner v. Mata*, 449 U.S. 539, 548-49 (1981) (stating that a court need not elaborate or give reasons for rejecting claims which it regards as frivolous or totally without merit); *Lego v. Twomey*, 404 U.S. 477, 482 n.6 (1972) (reviewing court of appeals' summary affirmance without comment on its summary nature); *see also Coleman v. Thompson*, 501 U.S. 722 (1991); *Harris v. Rivera*, 454 U.S. 339, 344 (1981).

Whether an appellate court simply affirms without opinion, affirms on the opinion below, or mentions only the significant issues, the result is the same – the arguments raised by the losing party have been rejected. Affiliated seeks not to enforce traditional appellate practice but to create a new rule, the magnitude of which would significantly change state and federal appellate practice. Were the courts of appeals' time unlimited, their opinions could discuss every argument, no matter how trivial, raised by appellants. Courts' time is not boundless, however, and such an exercise would not comport with traditional appellate practice.

Second, Affiliated seeks support in the rules of preclusion, arguing that when a court of appeals "affirms on one ground and disregards the other[s] . . . .", the issues which are not specifically mentioned may be relitigated. Pet. at 16, *quoting Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986). Affiliated's argument is irrelevant and turns on its head its own contention that it has been deprived of its rights by the Second Circuit. If Affiliated retains the right to reargue these unmentioned points in collateral proceedings, then it has not been deprived of any rights.

It is apparent that traditional appellate practice contradicts, not supports, Affiliated's position.

b. The Second Circuit fully exercised its jurisdiction after the district court entered a final judgment.

Affiliated notes that federal law permits a party but one appeal, after a final judgment. According to Affiliated, the courts of appeals are thus required to analyze separately and specifically the merits of each and every argument raised in that final appeal. Affiliated claims that without such individualized treatment of each and every issue, arguments not specifically discussed must be deemed to have "fall[en] between the cracks," contrary to a never-articulated legislative intent behind the final judgment rule.

This case actually illustrates why such a rule does not, and should not, exist. Affiliated squarely presented its seven arguments in (i) its appellant's brief, (ii) its opposition to Respondents' petition for rehearing, and (iii) its own petition for rehearing. These meritless, thrice-repeated arguments did not fall between the cracks, and the decision below did not expose some latent risk in the final judgment rule.

The decisions of the Second Circuit are the product of an appellate court properly using its resources. The court analyzed the issues presented, and without wasting resources on meritless arguments that required no written analysis, discussed those arguments it deemed worthwhile to explore at length. *See Taylor*, 407 U.S. at 194 n.4; *Sumner*, 449 U.S. at 548-49; *Garza*, 165 F.3d at 314 ("Even

though this Court did not expressly discuss [an issue], the issue nonetheless received fair consideration and a ruling."); *Mainiero*, 105 F.3d at 365 (" 'An appellate court is not a performing bear, required to dance each and every tune played on an appeal . . . . Any of the . . . issues raised and not discussed . . . can be deemed to lack sufficient merit or importance to warrant individual attention' ") (*quoting State v. Waste Management of Wis., Inc.*, 261 N.W.2d 147, 151 (Wis. 1978)); *United States v. Patel*, 879 F.2d 292, 295 (7th Cir. 1989); *Furman*, 720 F.2d at 264-66; *Jones v. United States*, 1990 WL 6566, at *3 (court would not presume that undiscussed issues had been disregarded).

The Second Circuit fully exercised the jurisdiction granted it by Congress. In fact, the Second Circuit heard Affiliated's seven arguments multiple times, and resolved them. Just as in many other cases that are partly or completely summarily decided, Affiliated has had a full and fair opportunity to present its arguments and those arguments have been rejected by the Second Circuit. Affiliated was not denied any rights.

2. No conflict exists between the proceedings below and other caselaw.

a. No conflict exists between the proceedings below and this Court's "teachings."

Affiliated notes that when an issue has not been ruled upon, this Court will often remand the case to allow the lower court to consider the previously unaddressed issues. The cases cited by Affiliated, however,

merely involve situations where this Court remanded to permit the courts below to consider unaddressed issues revived by the Court's reversal of the decision below.

First, in both *United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976), and *Wood v. Strickland*, 420 U.S. 308 (1975), this Court granted certiorari and reversed the lower court's decision on substantive issues. The Court then remanded to give the court of appeals an opportunity to rule upon other issues raised by the respondents that had not been decided precisely because of the lower court's prior rulings. In the present case, Affiliated does not seek reversal on substantive grounds, but only a remand so that it can reargue the seven points specifically rejected by the district court and already argued no less than three times to the Second Circuit. The Second Circuit had ample opportunity to consider Affiliated's positions, and plainly resolved them against Affiliated. No conflict exists between the Second Circuit's decision and the procedures followed in these cases.

Second, in both of the double jeopardy cases cited by Affiliated, this Court reversed the court below on a *substantive* issue. Recognizing that other substantive issues quite properly had not been considered in the first instance by the appellate or trial court below, this Court followed its usual procedure and remanded for further determination. *Benton v. Maryland*, 395 U.S. 784 (1969); *United States v. Wilson*, 420 U.S. 332 (1975). For example, in *Wilson*, a criminal defendant made a number of post-verdict motions and won a dismissal of the indictment on a *Marion* delay claim. 420 U.S. at 333, 353. The court of appeals held that the government could not appeal from

such a decision, and therefore the court could not consider the substance of the appeal. This Court reversed, finding that such appeals were permissible. *Id.* at 339, 352-53. The Court therefore remanded the entire case to the court of appeals to make the initial substantive review. *Id.* at 353. Similarly, this Court in *Benton* reversed a larceny conviction on double jeopardy grounds, and remanded to permit a state court to analyze, in the first instance, the relationship under state law between the larceny and burglary charges. 395 U.S. at 797. In contrast, here all of Affiliated's arguments were ruled upon and rejected by the Second Circuit in its remand to the district court for entry of a modified judgment.

Third, Affiliated argues that *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398 (1960), supports its position. In fact, this Court granted certiorari in *Deena Artware* on the issue of whether discovery should be ordered to permit inquiry into the second of two theories proposed by the National Labor Relations Board ("Board") – whether the defendants were a "single enterprise" – which the Board could not present fully because of the lack of discovery. 361 U.S. at 401-02. The issue was not that the court of appeals failed to mention the alternative theory, but whether the Board should have had the opportunity to present its claim fully in the first instance. Unlike *Deena Artware*, Affiliated does not argue that it was thwarted by the Second Circuit from fully and fairly briefing any issues.

There is simply no support in the governing caselaw that gives a litigant a due process or any other right to a written opinion on each and every issue it raises. None of these cases stands for such a proposition. Because none of

this Court's prior holdings suggests such a rule, review by this Court is unwarranted.

b. No conflict exists between the proceedings below and other courts of appeal.

Affiliated also attempts to create a conflict between the decision below and two decisions of other courts of appeal. However, these so-called conflicts are illusory.

In one instance, in an appeal of a denial of *habeas corpus* relief in a death penalty case, the Eleventh Circuit panel deliberately did not address a sentencing-phase ineffective assistance of counsel argument because to do so would have been inconsistent with the determination that a new sentencing phase was required. *Tucker v. Francis*, 723 F.2d 1504, 1516 (11th Cir. 1984), *vacated on rehearing en banc, Tucker v. Kemp*, 762 F.2d 1496, 1499-1500 (11th Cir. 1985). When the court *en banc* reversed the panel on the sentencing relief, it chose to remand the deliberately undecided issues for initial consideration by the panel. *Tucker v. Kemp*, 762 F.2d at 1509-10. In the instant case, however, the panel, upon rehearing, did not avoid addressing the seven arguments, deliberately or otherwise. In fact, the panel ruled against all of Affiliated's arguments by remanding the case for recalculation of damages. No conflict therefore exists between the decision below and the Eleventh Circuit's treatment of a death penalty *habeas* appeal.

Affiliated also claims that a conflict exists between the decision below and the Federal Circuit's procedural decision to reinstate an appeal that it had erroneously dismissed as not final. *See W.L. Gore & Assocs., Inc. v.*

International Med. Prosthetics Research Assocs., Inc., 975 F.2d 858 (Fed. Cir. 1992). *W.L. Gore* stands for the unsurprising proposition that if a court on reconsideration decides that it does have jurisdiction to hear an appeal, all motions pending when the appeal was dismissed are reinstated. *See* 975 F.2d at 860, n.1. *W.L. Gore* does not state, however, as Affiliated mistakenly suggests, that a court of appeals is required to state explicitly its reasoning – as opposed to issuing a summary decision – when it does consider the reinstated motion.

Because there is no conflict between the circuits on this issue, review by this Court is not warranted.

3. Affiliated failed to present fairly to the Second Circuit the Constitutional and procedural appellate practice issues raised in this petition.

Affiliated frames the questions presented as raising issues of Constitutional due process and fundamental fairness, statutory rights to appeal, and procedural appellate practice. Affiliated repeatedly admits that, after the initial panel decision, it twice drew the Second Circuit's attention to the other seven issues that it felt remained undecided. See Pet. at 9 and 11, n.6. Affiliated, however, failed to present fairly to the Second Circuit its contention that the failure specifically to mention each and every issue constituted a violation of its Constitutional and statutory rights and procedural appellate practice. In fact, the whole of Affiliated's argument at all stages in the proceedings below only touched on the rights it says were violated in two passing references in its Petition for Rehearing or Rehearing *en banc*. Resp. App. at App. 6, 7.

There is not a single citation in support of or discussion of the issues raised in this petition.

Such a passing reference did not fairly present the issue to the Second Circuit, and this Court should not grant *certiorari* on an issue that was never fairly raised below. *See Auer v. Robbins*, 519 U.S. 452, 464 (1997) (argument inadequately preserved in prior proceeding not considered on *certiorari* review); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *see also, Adams v. Robertson*, 520 U.S. 83 (1997) (dismissing certiorari as improvidently granted for failure properly to present federal question presented to state court below). Accordingly, Respondents object pursuant to Supreme Court Rule 15.2 to consideration of the questions presented because the issues they set forth were not fairly presented below.

CONCLUSION

Affiliated's petition fails to make the requisite compelling showing pursuant to Supreme Court Rule 10 for a writ of certiorari. The practice of the Second Circuit in this and in other cases, *i.e*, providing a written opinion mentioning some of the claims raised by the litigants without specifically mentioning others, is entirely consistent with the normal practice of this Court, other federal courts of appeals, and the courts of the several States.

Accordingly, Affiliated's petition for a writ of certiorari should be denied.

Respectfully submitted,

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App. 1

97-7982

United States Court of Appeals
for the
Second Circuit

CHEMICAL BANK, EUROPEAN AMERICAN BANK, BANQUE PARIBAS, AMERICAN EXPRESS BANK LTD., NATWEST BANK NATIONAL ASSOCIATION and RABOBANK NEDERLAND,

Plaintiffs-Appellees

– against –

AFFILIATED FM INSURANCE CO.,

Defendant-Appellant,

ANDINA COFFEE, INC. and ANDINA TRADING CORP.,

Consolidated Plaintiffs-Appellees.

(For continuation of Caption See Next Page)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFILIATED AM INSURANCE CO.'S PETITION FOR REHEARING AND/OR FOR REHEARING EN BANC

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– and –

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Defendants.

Table of Contents

Preliminary Statement 1

Summary of Argument 2

Statement of Facts 3

The December agreement 4

The April agreement 4

The events of August 5

The proceedings below 6

Statement of Reasons for Panel Rehearing and for En Banc Consideration 7

Points of Law and Fact Overlooked or Misapprehended as to the April Agreement 9

A. The panel's rehearing decision erred in concluding that the April agreement did not allocate risk and premiums from Affiliated to the London insurers 9

B. The panel's rehearing decision misinterprets the "overlap" clause and its bearing on the April agreement 14

Points Overlooked or Misapprehended by the Panel as to the Undecided Issues 17

[Two examples of undecided issues]

A. The future-dated draw documents on the basis of which plaintiffs won a $92 million award, neither "conformed" to the bank's own letters of credit nor qualified as "covered" documents under the policy's "FBOL" clause 17

B. The district court erred in rejecting federal maritime jurisdiction 19

Conclusion 20

Addendum

A. The panel's original, February 25, 1999 decision

B. The panel's November 8, 1999 decision on rehearing

C. Excerpts from the trial testimony, and relevant trial exhibits

D. Covers, tables of contents, and selected pages from Affiliated's main brief (pp. 2, 15, 32-65) and reply brief (pp. 6, 25) and the American Insurance Association's amicus brief (pp. 1-7, 12-19, 29-34), relevant to the issues not yet decided

* * *

Some of these substantial issues provide a complete defense to plaintiffs' claims: others, only a partial defense. In any event, they cannot in fairness, as a matter of due process, and consistent with sound appellate court procedure, be allowed to slip through the cracks undecided just because the panel originally concluded, correctly we think, that this appeal could be disposed of on the basis of the December agreement canceling Affiliated's coverage as of February 25 and the April agreement replacing Affiliated with the London insurers on pre-February 25 interior risk.

If the panel does not grant rehearing and reinstate the original decision, nor decide the other substantial issues raised on this appeal, Affiliated suggests en banc consideration. We set out below the reasons why at least several of these undecided issues are themselves of exceptional importance, and why any appellate procedure which would allow such substantial issues to go undecided is of exceptional importance requiring en banc review.

* * *

Points Overlooked or Misapprehended by the Panel as to the Undecided Issues

Simple fairness, due process, and sound appellate practice require decision on the other substantial issues raised on this appeal. None were addressed in the panel's original or November 8 decisions. Affiliated sought to remind the panel that these issues must necessarily be decided if rehearing were granted, but did so only in a

long footnote in its Opposition to Rehearing (Page 19, n.18) We acknowledge our mistake in so relegating this reminder to a footnote.

Rather than attempt to rehearse all those issues here, we include in Addendum D the relevant portions of our main and reply briefs and of the American Insurance Association's amicus brief addressing these issues. These demonstrate that the undecided issues are substantial, raise complete or partial defenses, are fully briefed, and that it would be exceedingly unfair, a violation of due process, and a departure from sound appellate procedure to authorize a judgment for more than $50 million without deciding them on the merits. For illustrative purposes only we use the space available briefly to describe just two of the seven undecided issues.

* * *

Conclusion

For the reasons stated, Affiliated requests that the panel reconsider its November 8 ruling on the scope and effect of the April agreement, and reinstate its original ruling on that issue. If the panel declines to grant that relief, Affiliated requests that it decide the other undecided issues, restoring them to the argument calendar if that is deemed useful. Absent such relief,

Affiliated suggests en banc consideration in light of the importance of the substantive and procedural issues.

November 29, 1999

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Supreme Court, U.S.
FILED
DEC 4 2000

(3)

No. 00-659

IN THE

Supreme Court of the United States

AFFILIATED FM INSURANCE CO.,

Petitioner,

v.

CHEMICAL BANK, EUROPEAN AMERICAN BANK, BANQUE PARIBAS, AMERICAN EXPRESS BANK LTD., NATWEST BANK N.A., RABOBANK NEDERLAND, ANDINA COFFEE INC., and ANDINA TRADING CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Petitioner's Reply Brief	1
A. That appellate courts are not obligated to address at length issues they regard as "frivolous or totally without merit" does not explain or justify what was done here	2
B. That courts may, in special circumstances, dispose of certain cases without opinion does not support the Court of Appeals' right to avoid deciding substantial issues without a word of explanation	4
C. Respondents' assertion that Affiliated failed to raise the procedural issue it now presses is simply untrue	7
D. Respondents have impaled themselves on the horns of a dilemma	9
Conclusion	10
Appendix — Opinion Of The United States District Court For The Southern District Of New York Re *Lionel Thomas v. NASL Corp.*, New York Law Journal, November 28, 2000	1a

TABLE OF CITED AUTHORITIES

	Page
Adams v. Robertson, 520 U.S. 83 (1997)	8
Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)	8
Auer v. Robbins, 519 U.S. 452 (1997)	8
Furman v. United States, 720 F.2d 263 (2d Cir. 1983)	6
Kairys v. I.N.S., 981 F.2d 937 (7th Cir. 1992)	7
Lionel Thomas v. NASL Corp., 2000 U.S. Dist. LEXIS 16761 (S.D.N.Y. November 20, 2000)	9
Mainiero v. Jordan, 105 F.3d 316 (7th Cir. 1997)	7
State v. Maniero, 525 N.W.2d 304 (Wis. Ct. App. 1994)	7
Strickler v. Greene, 527 U.S. 263 (1999)	2
Sumner v. Mata, 449 U.S. 539 (1981)	5
Taylor v. McKeithen, 407 U.S. 191 (1972)	5
United States v. Chemical Foundation, 272 U.S. 1 (1926)	2
United States v. Garza, 165 F.3d 312 (5th Cir. 1999)	6

Cited Authorities

	Page
United States v. Jones, 763 F.2d 518 (2d Cir. 1985)	7
United States v. Patel, 879 F.2d 292 (7th Cir. 1989)	6, 7
Statutes:	
28 U.S.C. § 2253(c)(1)(B)	6
28 U.S.C. § 2255	5, 6
Rules:	
Fed. R. App. Proc. 36	4
Fed. R. App. Proc. 36(a)(2)	4
Second Circuit Rule 0.23	4
United States Supreme Court Rule 18.12	5
Other Authority:	
New York Law Journal, November 28, 2000	9

PETITIONER'S REPLY BRIEF

Petitioner Affiliated contends that because the court below initially focused on what it believed was a single dispositive issue requiring judgment for Affiliated (the "policy cancellation" issue), it inexplicably failed — when it did grant rehearing and partially reverse itself on cancellation — to go back and address and decide *any* of the seven equally substantial issues originally raised by Affiliated and extensively briefed by both sides. The petition explains why this failure violates Affiliated's right to appeal, sound appellate practice, due process and fundamental fairness, and conflicts with decisions of this Court and other federal circuit courts.

Respondents' Opposition fails entirely to meet the heart of Affiliated's argument — that the court below never reached, addressed, decided or adjudicated any of the seven substantial issues — although some provide a full defense to the judgment now reduced to $64 million, while others provide partial defenses each worth many millions of dollars.

Instead, respondents simply speculate (given the absence of any objective indication) that the court did somehow consider and decide all issues raised. Based on that speculation, they primarily advance three "arguments": (1) that appellate courts are not obligated to issue full written opinions disposing of each and every issue raised by a party; (2) that appellate courts may summarily dispose of particular issues and entire appeals; and (3) that Affiliated allegedly failed to warn the court below that failure to adjudicate the "undecided issues" would violate its right to appeal, sound appellate practice, due process and fundamental fairness.[1] As we show below, these arguments

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1. Lacking any objective proof that the court did consider and decide all issues raised, respondents also suggest (Opposition, p. 16) that the court's practice in this case is somehow protected by a "presumption of regularity." That "presumption" is not applied to insulate judicial decisions from review by this Court. Rather, as (Cont'd)

neither fairly address the issues raised in the petition nor fairly portray what happened in the court below. Still less do they weigh persuasively against Affiliated's petition that this Court grant the writ.

A. That appellate courts are not obligated to address at length issues they regard as "frivolous or totally without merit" does not explain or justify what was done here

Affiliated does not argue that federal appellate courts must always address at length every insubstantial issue raised by a party. Appellants and appellees do sometimes raise issues which are "frivolous" or "totally with merit." And courts not infrequently dispose of such insubstantial issues with familiar phrases like "The remaining issues raised by appellant are without merit," or "do not require discussion." But that's not what happened here.

First, the court below pointedly omitted either to consider and decide or to say *anything* regarding the merits of the seven issues.[2] Neither its February 25, 1999 decision reversing the

(Cont'd)
demonstrated by the very cases they cite, the "presumption" is applied to the conduct of members of the executive branch, and is a function of the "separation of powers" doctrine. For example, it was applied in *Strickler v. Greene*, 527 U.S. 263, 286 (1999), to sustain the conduct of a prosecutor, and in *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926), to conduct of the Alien Property Custodian acting at the direction of the President.

Regrettably, respondents also seek to besmirch Affiliated and its counsel by dredging up unwarranted attacks respondents had made on their pre-trial conduct — without disclosing to this Court that those same attacks were the subject of an unsuccessful pretrial motion (whose rejection was never appealed), and again raised after trial based on extra-record evidence to which Affiliated was not permitted to respond.

2. The court's only reference to these issues was in its original decision vacating the judgment in its entirety, where it opened its
(Cont'd)

$93 million judgment against Affiliated on the ground that cancellation was complete, nor its November 8, 1999 rehearing decision which reinstated over $60 million of the award on the ground that cancellation was only partial, nor its July 24, 2000 order summarily denying Affiliated's petition for rehearing, so much as mentioned the seven "undecided" issues, either collectively or individually. Accordingly, the tradition of using short "catchwords" to express a court's dismissal of an issue as frivolous or without merit has no application here.

Second, the seven issues left "undecided" in this case were not "insubstantial" issues fairly susceptible to disposition by "catchword." Affiliated's original appellate brief devoted 15 pages to the two-part cancellation issue, but twice that number — at least 30 pages — to the other seven issues. Affiliated's reply brief spent 6 pages on cancellation, but 18 pages — or three times that number — on the other seven issues. Even the appellees devoted just 10 pages of their brief to cancellation, compared to 30 pages to the other seven.

As *amicus curiae*, the American Insurance Association expressly supported Affiliated's position on three issues: (1) that both cancellations were effective; (2) that no coverage for losses from "fraudulent bills of lading" exists where bank plaintiffs close their eyes to "red flags" necessarily raised by future-dated draw documents; and (3) that Affiliated's standard clauses limiting liability and capping "accumulation of interests" — to $8 and $16 million, respectively — should not be "brushed aside" by reading them out of the policy or by insisting they be applied to each individual draw document. The *amicus* stressed

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(Cont'd)
"discussion" of the case with these perfectly neutral words: "Affiliated makes several claims of error on appeal, but the dispositive issue is whether the Banks are bound by [the two cancellation events]." Petition, at 17a. Nothing in that sentence implies any view of the merits of the "several claims of error." And since the court ruled in Affiliated's favor on the basis of cancellation, it had no occasion to reach or decide any of its other defenses.

the "vital importance" to the insurance industry that the appellate court reverse the district court's erroneous rulings on at least these three commercially significant issues.

B. That courts may, in special circumstances, dispose of certain cases without opinion does not support the Court of Appeals' right to avoid deciding substantial issues without a word of explanation

Respondents argue (Opposition, p. 18) that it matters not "Whether an appellate court simply affirms without opinion, affirms on the opinion below, or mentions only the significant issues. . . ." They could not be more wrong.

First, affirming "on the opinion below" means that the appellate court has adopted a lower court's opinion as its own. The Second Circuit often adopted opinions by judges like Learned Hand or Edward Weinfeld. In such cases, one could read the adopted opinion to learn precisely what was decided, as well as the reasons for the decision. But that did not happen in this case. Nor could it, for the court below reversed Judge Pollack on the cancellation issue, concluding that he had failed to apply the applicable law and had made a crucial fact-finding that was "clearly erroneous." And it must have noticed that his 50-page opinion, disposing of almost a dozen legal issues, cites not a single legal authority.

Second, respondents assert the alleged right of federal appellate courts to affirm without an opinion. They point, *first*, to Rule 36 of the Federal Rules of Appellate Procedure. That rule — 36(a)(2) — addresses the technical question of how judgments are entered, and refers without explanation to entry "if a judgment is entered without an opinion." Nothing in that rule, or in any other cited by respondents, authorizes a court of appeals to decide a substantial case without making clear what issues have been considered and decided. They point, *second*, to Rule 0.23 of the Second Circuit's own rules. That rule authorizes a panel to dispose of a case "in open court or by

summary order" where the panel is unanimous and each member "believes that no jurisdictional purpose would be served by a written opinion," and provides procedures for doing so. No such procedures were followed here. *Third,* they point to this Court's own Rule 18.12, dealing with direct appeals from district courts. But that rule contemplates summary disposition only where the Court determines not to set a case for briefing or argument on the merits — not afterward. None of these rules relieves an appellate court of its fundamental obligation to disclose which issues have been considered and decided, and how they have been decided. Significantly, respondents cite not a single instance where a federal court of appeals has ordered entry of judgment in a large case — in this instance, awarding more than $60 million to plaintiffs and bristling with important legal issues attracting the attention of the American insurance industry — without a written opinion.

Respondents get no support from the decisions they cite from this Court. (Opposition, p. 18) Indeed, those cases are fatal to their position. In both *Sumner v. Mata,* 449 U.S. 539 (1981), and *Taylor v. McKeithen,* 407 U.S. 191 (1972), this Court *reversed* federal appellate courts for making summary dispositions without explaining how they had treated certain issues. That practice left this Court unable to review what they had done, and with no "insight" into their thinking. *Taylor* is especially relevant. There, the Fifth Circuit reversed without opinion the district court's decision adopting a legislative reapportionment plan for New Orleans. When the original plaintiffs petitioned for certiorari, this Court granted the writ, vacated and remanded to the Court of Appeals for elaboration of its decision, without waiting for briefing and oral argument. In *Sumner,* this Court reversed the Ninth Circuit for rejecting a Section 2255 petition, in the face of contrary conclusions by a state appellate court and a federal district judge, without offering an adequate written explanation to show just what factors it had, or had not, considered.

Third, respondents assert the right of federal appellate courts to discuss important issues, while simply ignoring others. Again, none of the cases they cite support their position. (Opposition, pp. 17-19) For example, in *United States v. Garza,* 165 F.3d 312 (5th Cir. 1999), defendant sought a "certificate of appealability" under 28 U.S.C. § 2253(c)(1)(B) entitling him to review of a district court's denial of his Section 2255 motion to vacate a death sentence. One contention was that, on his original appeal from the conviction, the same appellate court had overlooked or failed to address his challenge to certain "aggravating factors" evidence, while dealing at exhaustive length with other evidentiary issues. The court said that a "litigant's right to have all issues fully considered and ruled on by the appellate court does not equate to a right to a full written opinion on every issue raised." 165 F.3d at 315. But it found it necessary to add that, although it had not discussed the issue explicitly in its earlier opinion, "the issue nevertheless received full consideration and a ruling," and that its statements in the original opinion that it found "no reversible error" and that defendant had "shown no error" were broad enough to encompass the specific claims of error. By contrast, in our case, although twice asked to do so (in our opposition to plaintiffs' petition for rehearing, and in our petition for rehearing), the Second Circuit has never stated that it ever considered or decided the seven "undecided" issues, nor has it ever asserted that those issues were "without merit."[3]

3. Each of the other cases cited by respondents also contained what the decisions in our case did not — explicit representations that all the issues had been considered and decided. In *Furman v. United States,* 720 F.2d 263 (2d Cir. 1983), the opinion constituting the "summary affirmance" was five pages long and discussed eleven separate issues raised by Furman. In *United States v. Patel,* 879 F.2d 292 (7th Cir. 1989), the appellate court expressly stated that only one of the issues raised "merits discussion," and in denying rehearing, the court expressly stated that it had considered all the issues raised by Patel, had now reconsidered them, and was "satisfied that the remaining issues indeed lack merit and do not require discussion." 879 F.2d at

(Cont'd)

C. Respondents' assertion that Affiliated failed to raise the procedural issue it now presses is simply untrue

It is not always possible or necessary for a petitioner to raise in the appellate court an objection arising out of the manner in which the appellate court decided the appeal. But in this case, it is clear that Affiliated *did* raise with the court below that failure to reach and decide the seven issues left "undecided" when the court temporarily focused on the cancellation issue would deprive Affiliated of basic rights. After listing the "undecided issues," Affiliated cautioned the panel, at page 9 of its rehearing petition, that:

> Some of these substantial issues provide a complete defense to plaintiffs' claims; others, only a partial defense. *In any event, they cannot in fairness, as a matter of due process, and consistent with sound appellate court procedure, be allowed to slip through the cracks undecided* just because the panel originally concluded, correctly we think, that this appeal could be disposed of on the basis of the December agreement canceling Affiliated's coverage as of February 25 and the April agreement replacing Affiliated with the London insurers on pre-February 25 interior risk. (Emphasis supplied)
>
> If the panel does not grant rehearing and reinstate the original decision, nor decide the other

(Cont'd)

295. In *United States v. Jones*, 763 F.2d 518, 520 (2d Cir. 1985), the court affirmatively stated that "Appellants raise a number of claims, only two of which require discussion." In *Kairys v. I.N.S.*, 981 F.2d 937 (7th Cir. 1992), the court found that the thumbprint issue raised on the second appeal had in fact been discussed on the first appeal, although not necessarily in the words the party would have preferred. And in *Mainiero v. Jordan*, 105 F.3d 316 (7th Cir. 1997), the issue which petitioner alleged had not been decided in his state court appeal had in fact been addressed and decided by the intermediate appellate court. *State v. Maniero*, 525 N.W.2d 304, 306, 309-12, 314 (Wis. Ct. App. 1994).

> substantial issues raised on this appeal, Affiliated suggests en banc consideration. We set out below the reasons why at least several of these undecided issues are themselves of exceptional importance, and why any appellate procedure which would allow such substantial issues to go undecided is of exceptional importance requiring en banc review. (Footnote omitted)

Once again, the cases cited by respondents (Opposition, p. 25) fail to support their position. *Auer v. Robbins*, 519 U.S. 452, 464 (1997), held that the argument raised by the policemen plaintiffs could not be made in their lawsuit, but had to be raised first by petition to the Secretary of Labor for an amendment to the "disciplinary deduction" rule. In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), petitioner sought to raise in this Court an issue it had presented to the district court but failed to raise on appeal. And the Court dismissed the writ as improvidently granted in *Adams v. Robertson*, 520 U.S. 83 (1997), when it appeared that, with respect to a ruling by a state trial court, petitioner had failed to define or present a federal question on its appeal to the state supreme court, from which it now sought Supreme Court review. None of those cases bear on this one, where Affiliated seeks review of the manner in which the appellate court itself decided the case.

* * *

The fact is that the court below left in place a judgment against Affiliated exceeding $60 million, without ever considering or deciding seven substantial issues, including issues of "vital importance" to the American insurance industry, which provide Affiliated with complete or partial defenses. The district court's 50-page opinion, awarding $93 million to the plaintiffs, addressed or raised most of those issues — without citing a single legal authority. And it remains discredited — held by the appellate court to have been wrong on the law (at least as to policy cancellation) and "clearly erroneous" as to

a key fact finding. No one — except for respondents who point to no objective indicia to support their speculation — believes the court below actually decided any of the "undecided" issues.

Consider, for example, Affiliated's contentions — based on solid precedent — that the federal maritime jurisdiction applied because all the Colombian coffee covered by its policy was always intended to be shipped by sea to New York, that the maritime jurisdiction brought into play the federal "uberrimae fidei" or "utmost fidelity" test, and that plaintiffs flunked this test when they failed to inform Affiliated that they had allowed payment on future-dated draw documents, or that they suspected Andina's complicity in the fraud conducted by some of its own senior officers and by its corporate parent. Judge Pollack rejected all these claims, despite overwhelming precedent to the contrary. Nevertheless, his Southern District colleagues continue to follow the pre-*Chemical Bank* precedents cited by Affiliated — contrary to the respondents' notion that the appellate court necessarily affirmed Judge Pollack on all those issues. A striking recent example is Judge Koeltl's decision in *Lionel Thomas v. NASL Corp.*, 2000 U.S. Dist. LEXIS 16761 (S.D.N.Y. November 20, 2000), reported in the *New York Law Journal* for November 28, 2000, and reproduced as an addendum to this reply. Judge Koeltl accepted and applied the very rules on federal maritime jurisdiction and *uberrimae fidei* which Judge Pollack rejected, which Affiliated pressed upon the court below, but which respondents now assert that court must necessarily have rejected. If the appellate court is deemed somehow to have implicitly affirmed Judge Pollack on these issues and rejected Affiliated's positions, that remains a well-kept secret, not cognizable by district judges sitting in the Second Circuit, or litigators practicing there.

D. Respondents have impaled themselves on the horns of a dilemma

What the court below did here — focusing exclusively on a single issue which initially seemed dispositive but later proved

only partially so, while declining to go back and address other substantial issues of "vital importance" to a major industry — cannot be allowed to stand. For one thing, it deprives Affiliated of its right to appeal, to sound appellate practice, to due process, and to fundamental fairness. For another, it leaves in doubt the state of the law in the Nation's commercial heartland. Can this Court really tolerate the situation where a thoughtful federal trial judge like John Koeltl must now read tea leaves or the brief filed by the present respondents back in 1998 in order to divine Second Circuit law on federal maritime jurisdiction and the *uberrimae fidei* doctrine — while his colleagues in New York, Connecticut and Vermont must do the same in order to divine Second Circuit law on limitation-of-liability clauses in insurance policies, whether future-dated draw documents can be deemed legitimate "bills of lading, and when date-of-loss is deemed to occur in marine cargo insurance policies?

Respondents have impaled themselves on the horns of a dilemma: If they are correct and the court below did silently affirm Judge Pollack's rejection of all seven of Affiliated's defenses, then no district judge sitting in the Second Circuit, no Second Circuit judge who did not sit on the *Affiliated* panel, and no litigator practicing in the Second Circuit can determine the Circuit's law on these seven important subjects. If respondents are wrong and the court below did fail to consider and decide these seven substantial issues, then Affiliated must pay a $64 million judgment, without regard to the merits of the seven substantial defenses it timely raised and fully briefed on appeal. Neither alternative is acceptable — as a matter of sound appellate practice, Affiliated's right to appeal, due process, and fundamental fairness.

CONCLUSION

The Court should grant the writ to review the lower court's failure to consider and decide the substantial issues presented by the present case, then reverse the judgment below and remand with instructions to adjudicate those issues.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK RE *LIONEL THOMAS v. NASL CORP.*, NEW YORK LAW JOURNAL, NOVEMBER 28, 2000

LIONEL THOMAS

v.

NASL CORP.

New York Law Journal
November 28, 2000

SOUTHERN DISTRICT

Judge Koeltl

LIONEL THOMAS v. NASL CORP. QDS:02763211 The plaintiff, Stephen Lionel Thomas ("Thomas") has filed this declaratory judgment action pursuant to 28 U.S.C. §2201 and common law doctrines of fraud against NASL Corp. ("NASL"), Bowman Import/Export Ltd. ("Bowman"), Joy-Lud Distributors International, Inc. ("Joy-Lud"), F.J. Elsner & Co. ("F.J. Elsner"), and Bekington S.A. ("Bekington"), seeking a declaration that marine cargo insurance policies M829460 and L929460 ("the policies") are null and void and should be rescinded. The plaintiff's action is founded on an allegation that NASL violated the duty of utmost good faith, which governs marine insurance contracts under federal admiralty and New York state law, by failing to disclose material facts about its financial status. The plaintiff sues on his own behalf and on the behalf of certain other Lloyd's Underwriters subscribing to the policies

(collectively "Lloyd's"). Jurisdiction is asserted under 28 U.S.C. §1333(1) because the matter in controversy allegedly relates to rights and obligations that affect maritime commerce, particularly the formation of marine cargo insurance policies.

NASL, Bowman, Joy-Lud, and F.J. Elsner now move to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim and Fed. R. Civ. P. 9(b) for failure to plead fraud with sufficient particularity.[1] They also contend that the complaint does not meet the requirements of Fed. R. Civ. P. 10(b), which requires separate claims in separate counts, and they move to strike certain allegations in the complaint pursuant to Fed. R. Civ. P. 12(f).

I.

The following allegations in the complaint are accepted as true solely for purposes of this motion. NASL is a company that purchases frozen food products such as poultry from United States suppliers and receives a fee for transporting those products by sea to Eastern Europe and the former Soviet Union for distribution and sale. (Compl. ¶¶15-16.) In some instances, NASL would pay the producer directly or through a financier before shipping the cargo. In others, NASL would promise to pay the producer when the cargo reached its destination and was sold. (Compl. ¶16.)

In the spring of 1998, NASL approached Lloyd's through brokers about obtaining a marine cargo insurance policy to

1. Bekington has filed an answer and counterclaim and is not a party to any of the present motions.

cover the risk of loss or damage to its food products. (Compl. ¶17.) NASL wanted certain insurance terms that its prior insurers did not provide, such as coverage for the financiers who funded NASL's cargo purchases and an endorsement that would require the insurer to pay the financiers if NASL was guilty of infidelity or conversion. (Id.) Relying on positive statements by NASL's brokers concerning NASL's business history and minimal losses under prior policies, Lloyd's issued policy M829460 for the period from June 8, 1998 to June 7, 1999. The policy provided NASL with "all risks" coverage to NASL as well as coverage for shipments "for the account of others" that NASL is instructed to insure. The policy covered NASL's products from warehouse to warehouse and required an additional premium for time the products spent in cold storage greater than thirty days. (Compl. ¶19.) The policy also contained a New York choice of law clause. (Id.)

In June of 1998, NASL again approached Lloyd's through its brokers, this time seeking to obtain additional "financiers endorsements" relating to its policy for its private financiers. (Compl. ¶20.) NASL did not reveal its reasons for seeking such a policy, but Lloyd's alleges that NASL was motivated by its poor financial condition. (Compl. ¶20.) Lloyd's believes that NASL's financiers requested such endorsements so they would be guaranteed payment if NASL defaulted. (Compl. ¶21.) The endorsements were issued and gave four financiers, F.J. Elsner, Bowman, Bekington, and Joy-Lud (the "Financiers"), the status of additional insureds. (Compl. ¶¶22-23.) The Endorsements provided:

> This insurance, as to the interest of the financier shall not be impaired nor invalidated by any act

> or neglect of the named insured nor by failure to comply with warranty or condition over which the Financier has no control and this policy shall not be canceled nor materially changed as to the interest of the Financier unless ten (10) days written notice of such change or cancellation shall have been given to the Financier except with respect to war, strikes, riots and civil commotions which are subject to cancellation upon forty eight (48) hours notice.

(Compl. ¶22.)

During the first year of its policy, although it paid its premium late, neither NASL nor its financiers submitted any claims. (Compl. ¶24.) In the spring of 1999, NASL applied for renewal of its policy, disclosing only information of its "exceptional loss ratio" and emergence as one of the "premier frozen poultry traders for the future." (Compl. ¶25.) Based on these disclosures, Lloyd's issued policy L929460, which had terms substantially similar to the first policy, for the term June 8, 1999 to June 7, 2000. (Compl. ¶26.)

In July 1999, the Financiers submitted numerous claims to Lloyd's that to date total about $38 million. (Compl. ¶27.) According to Lloyd's, the claims detail that NASL stole approximately 64,000 metric tons of cargo from its transit vessels or warehouses and failed to repay the Financiers money it owes. (Compl. ¶28.) Lloyd's alleges that the Financiers reported that NASL and its Eastern European agent used fraudulent bills of lading, out-turn documents, warehouse receipts, and United States Department of

Appendix

Agriculture certificates to release the cargo without knowledge of its Financiers. (Compl. ¶29.)

After the claims were submitted, Lloyd's conducted an investigation into the claims as well as the validity of the assertions NASL made to obtain coverage initially. (Compl. ¶30.) In the course of the investigation, Lloyd's found the following facts: (1) in or about 1995, NASL was forced to seek outside funding as a result of financial strain caused by the confiscation of its train cars by Russian authorities for NASL's failure to pay required fees; (2) starting in 1995, numerous distributors and producers became reluctant to deal with NASL because of its lack of creditworthiness; (3) a major United States producer of frozen foods stopped selling to NASL in 1997 because of its poor credit reputation; (4) on at least three occasions, NASL loaded frozen food without making payment although payment was to be made before the shipments were loaded; (5) NASL frozen foods were seized by Estonian authorities as compensation for a producer that NASL had failed to pay; (6) NASL was involved in United States lawsuits for overdue payments to producers; (7) others in the shipping business believed that NASL had forged documents relating to the transport of food shipments; and (8) by the spring of 1999, NASL had diverted shipments of frozen food products and failed to repay the Financiers for certain of those products. (Compl. ¶31.)

Lloyd's claims that it could not have discovered these facts because of NASL's portrayal of itself as a successful company. (Compl. ¶32.) On December 9, 1999, Lloyd's tendered return of the premiums it had collected from NASL, together with interest, in the total amount of $73,070.40.

(Compl. ¶33.) Lloyd's now seeks to rescind the policies at issue.

II.

The defendants move to dismiss on two grounds. First, NASL and the Financiers argue that the complaint should be dismissed and no declaration issued rescinding the policies because NASL was not obligated to disclose information about which Lloyd's did not inquire.[2] Second, the Financiers argue that even if a claim has been stated to rescind the policies with respect to NASL, Lloyd's obligations to them continue to exist and therefore the complaint should still be dismissed against the Financiers.

On a motion to dismiss, the allegations in the complaint are accepted as true, see Cohen v. Koenig, 25 F.3d 1168, 1172-73 (2d Cir. 1994), although a court may consider certain materials outside the pleadings which are integral to the allegations. See Paulemon v. Tobin, 30 F.3d 307, 308-09 (2d Cir. 1994); Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991). In deciding a motion to dismiss, all reasonable inferences must be drawn in the plaintiff's favor. See Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir. 1995); Cosmas v. Hasset, 886 F.2d 8, 11 (2d Cir. 1989). The court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985).

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2. While Bekington is also a Financier, it is not a party to this motion.

Therefore, a defendant's motion should only be granted if it appears that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Valmonte v. Bane, 18 F.3d 992, 998 (2d Cir. 1994); see also Goldman, 754 F.2d at 1065.

For the reasons explained below, the plaintiff has stated a claim against NASL but not against the Financiers.

III.

The gist of the plaintiff's claims is that NASL failed to disclose facts material to the risk being insured and that this failure to disclose those risks violated the obligation of an insured to exercise utmost good faith, or uberrimae fidei, to the insurer. The first claim for relief is asserted under the English Marine Insurance Law and the second claim for relief is asserted under New York state law. However, in its papers and at argument, the plaintiff relied on federal admiralty law as the substantive law to be applied to the issue of whether the plaintiff has established a claim based on the alleged failure by NASL to disclose material risks. (See Tr. of October 18, 2000 Hearing at 29-33.) The defendants argue that New York law is the law to be applied and did not require NASL to volunteer all material facts about the risk to the insurer. There is no conflict between federal admiralty law and New York law on this issue because under both, the doctrine of utmost good faith applies to marine risks. Furthermore, at this stage of the proceedings, the plaintiff has sufficiently alleged the failure to disclose material facts with respect to the insurance for marine risks.

Appendix

A.

This Court has jurisdiction over this case pursuant to its federal admiralty jurisdiction. See 28 U.S.C. §1333(1). It is well established that federal admiralty jurisdiction extends to cases involving marine insurance contracts. See Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 313 (1955); Advani Enterprises v. Underwriters at Lloyd's, 140 F.3d 157, 161 (2d Cir. 1998); Hartford Fire Ins. Co. v. Mitlof, 193 F.R.D. 154, 157 (S.D.N.Y. 2000). While a contract containing both marine and non-marine elements will generally not be a basis for admiralty jurisdiction, see Hartford Ins. Co. v. Orient Overseas Containers Lines (UK), Ltd., No. 99-9502, 2000 WL 1608720, at *3 (2d Cir. Oct. 27, 2000), a claim under the marine portion of the contract will sustain jurisdiction where the marine elements are separable. See Atlantic Mut. Ins. Co. v. Balfour Maclaine Inter. Ltd., 968 F.2d 196, 199 (2d Cir. 1992). There is also maritime jurisdiction where the non-marine elements are merely "incidental" in an otherwise maritime contract. See id. Where an insurance policy contains both maritime and non-maritime obligations, a "federal court must initially determine whether the subject matter of the dispute is so attenuated from the business of maritime commerce that it does not implicate the concerns underlying admiralty and maritime jurisdiction." Id. at 200. In this case, all parties agree that the Court has subject matter jurisdiction because the plaintiff seeks a declaration that two insurance policies covering the overseas shipment and storage of marine cargo are void and should be rescinded. While the Court has an independent obligation to assure that it has subject matter jurisdiction, the plaintiff has alleged sufficient facts

concerning the predominant maritime nature of the policies and the incidental non-maritime aspects to sustain jurisdiction at this point. See Youell v. Exxon Corp., 48 F.3d 105, 109 (2d Cir. 1995), vacated on other grounds, 516 U.S. 801 (1995); Royal Ins. Co. v. Sportswear Group, 85 F. Supp.2d 275, 278 (S.D.N.Y. 2000).

B.

Because this case falls within this Court's federal admiralty jurisdiction, this Court must apply federal admiralty law to an issue if there is a federal admiralty rule relevant to resolving that issue. See Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 206 (1996); Wilburn, 348 U.S. at 314-15; Youell, 48 F.3d at 110.

Because Congress has not legislated with regard to marine insurance, "marine insurance policies are governed by state insurance regulations, unless the federal courts have fashioned an admiralty rule on point, or unless a need for such a federal rule exists." Youell, 48 F.3d at 110. The doctrine of utmost good faith is in fact a well established federal admiralty rule that governs the formation of marine insurance contracts and must be applied in this case. See Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 13 (2d Cir. 1986); Commercial Union Ins. Co. v. Flagship Marine Services, Inc., 982 F. Supp. 310, 313 (S.D.N.Y. 1997); Thebes Shipping, Inc. v. Assicurazioni Ausonia Spa, 599 F. Supp. 405, 426-27 (S.D.N.Y. 1984). The rule requires the party applying for insurance to "disclose all circumstances known to him which materially affect the risk." Puritan Ins. Co. v. Eagle Steamship Co., 779 F.2d 866, 870 (2d Cir.

1985). If the insured acquires material information after having applied for insurance, the insured is required to communicate that information. See id.; Commercial Union Ins. Co., 982 F. Supp. at 313; Thebes Shipping, Inc., 599 F. Supp. at 426. If the insured fails to disclose a material fact that the insurer relied upon in approving coverage, then the policy is void. See Puritan Ins. Co., 779 F.2d at 871; Commercial Union Ins. Co., 982 F. Supp. at 313; Thebes Shipping, Inc., 599 F. Supp. at 426.

The defendants argue that the doctrine of utmost good faith does not apply to this case because the claims submitted by the Financiers involved losses associated with the storage of produce in warehouses rather than losses at sea. They cite In re Balfour MacLaine Inter., Ltd., 85 F.3d 68 (2d Cir. 1996) for the proposition that the doctrine of utmost good faith does not apply to warehouse storage clauses if the provision can be severed and considered a separate "inland" risk. As the defendants point out, as in Balfour, the plaintiff's insurance policy has separate provisions for transit and warehouse coverage.

Balfour does not support granting the motion to dismiss in this case. In Balfour, an insurer sought a declaratory judgment that it was not required to pay certain claims under an open cargo marine policy that related to alleged losses of coffee from Mexican warehouses. After a full trial and a judgment for the insured, the Court of Appeals found that there was no admiralty jurisdiction over the declaratory judgment action for non-coverage because the connection between the missing coffee and admiralty jurisdiction was "simply too speculative and attenuated to justify admiralty

. . . jurisdiction" given the fact that the coffee was designated for transport by truck or rail from Mexico to Texas and the missing coffee never became marine cargo. See Id. at 75. The Court of Appeals reasoned that there was no admiralty jurisdiction over a claim that sought to void the entire insurance contract because the contract included maritime and non-maritime elements and thus there was no basis for admiralty jurisdiction unless the maritime aspects were separable or the non-maritime elements of the policy were incidental to an otherwise maritime contract. Moreover, the court was required to consider whether an issue related to maritime interests had been raised. However, the Court of Appeals found that the nature of the underlying transaction being insured coffee in Mexican warehouses had no connection with maritime commerce. Moreover, the non-maritime obligation that was at issue was not "incidental" to the policy as a whole; "[i]t required a separate premium and separate declarations, and account[ed] for a considerable volume of coffee insured under the policy." Id.

In this case, the fact specific findings that allowed the Court of Appeals in Balfour to conclude that there was no admiralty jurisdiction cannot be made on this motion to dismiss. Indeed, all parties concede that there is admiralty jurisdiction based on the extensive connection with maritime commerce for the policies at issue in this case, which insured the ocean shipment of poultry. The plaintiff asserts that the marine aspect of the policies was central to the policies and that the policies had only incidental warehouse coverage aspects. (Tr. of Oct. 18, 2000 Hearing at 40-41.) Moreover, the complaint alleges that there were extensive thefts from transit vessels or from warehouses. (Compl. ¶28.) The plaintiff

asserts that discovery will establish the central marine aspect of the subject matter of this dispute. Balfour does not foreclose the application of the doctrine of utmost good faith in this case.

The plaintiff has pleaded sufficient facts to survive a motion to dismiss his federal admiralty claim that NASL violated its duty of utmost good faith. He alleges that NASL violated its duty by failing to disclose numerous material facts, such as information about its financial stability. See, e.g., Employers Ins. of Wausau v. Triton Lines, Inc., No. 88 Civ. 5276, 1991 WL 190592, at *3 (S.D.N.Y. Sept. 18, 1991) (holding that failure to disclose prior loss history violates doctrine of utmost good faith). The plaintiff claims that if he had known these facts he would not have issued marine insurance to NASL. While the defendants argue that the undisclosed facts were immaterial, materiality is a question of fact that cannot be decided on this motion to dismiss. See Christiania Gen. Ins. Corp. v. Great American Ins. Co., 979 F.2d 268, 278 (2d Cir. 1992).

C.

The defendants fare no better in their motion to dismiss the second claim, which purports to be pleaded under New York law. New York applies federal maritime law to maritime cases. See Sundance Cruises Corp. v. American Bureau of Shipping, 7 F.3d 1077, 1080 (2d Cir. 1993).

Hence, under New York law, the doctrine of utmost good faith applies to the "marine" elements of a contract. See Balfour, 85 F.3d at 81 (citing Stecker v. American Home Fire Assur. Co., 84 N.E.2d 797, 798 (N.Y. 1949)); Scarburgh

Co. v. American Manuf. Mut. Ins. Co., 435 N.Y.S.2d 997, 1000-01 (Sup. Ct. 1979), aff'd, 439 N.Y.S.2d 298 (App. Div. 1981). It does not apply to in-land risks that are severable from the marine elements of the contract, which in turn depends on issues such as whether the inland risk is integrated with the remainder of the marine policy in terms of valuation, exclusions, and termination. See Balfour, 85 F.3d at 81 (citing Mur-Joe Distribs., Inc. v. Reliance Ins. Co., 1989 A.M.C. 2015, 2020 (Sup. Ct. 1989); Ebisons Harounian Imports, Inc. v. Travelers Indemnity Co., 1993 A.M.C. 1149, 1150-51 (Sup. Ct. 1992), rev'd on other grounds, 600 N.Y.S.2d 242 (App. Div. 1993)). The plaintiff seeks to rescind marine insurance policies, which clearly have substantial marine elements. It cannot be determined on this motion to dismiss whether there are non-marine elements of the policies that are severable.

D.

The defendants also move to dismiss the plaintiff's claims on the grounds that the plaintiff has failed to detail with sufficient particularity the alleged violations of the insured's duty of utmost good faith. In a case claiming such an alleged fraudulent omission, to satisfy Fed. R. Civ. P. 9(b), the plaintiff must "(1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent." Harsco Corp. v. Segui, 91 F.3d 337, 347 (2d Cir. 1996); accord Weaver v. Chrysler Corp., 172 F.R.D. 96, 101 (S.D.N.Y. 1997). The plaintiff has detailed the specific omissions in his complaint, attributed these

omissions to NASL, outlined how the omissions were made in the context of applying for the marine insurance, and explained with particularity how the omissions allowed NASL to represent itself as a financially sound company when it allegedly was not. The plaintiff has therefore alleged fraudulent omissions with sufficient particularity to satisfy Fed. R. Civ. P. 9(b).

The defendants, therefore, have failed to establish that the plaintiff's claims of failure to disclose material information relating to the risks insured should be dismissed either because they do not state a claim under Fed. R. Civ. P. 12(b)(6) or because they are pleaded with insufficient particularity under Fed. R. Civ. P. 9(b).

IV.

The Financiers argue that even if the policies are void with respect to NASL, Lloyd's cannot rescind the Financiers' coverage without an allegation of wrongdoing on the part of the Financiers. The Complaint alleges wrongdoing by the insured NASL in failing to disclose material facts relating to the risks insured, but it makes no such allegations against the Financiers. See Complaint at ¶¶2, 38-41, 49-52; Tr. of October 18, 2000 Hearing at 33-34. The plaintiff counters that if the policies are void with respect to NASL, Lloyd's owes no obligation to the Financiers. The Financiers are correct because under New York law, they have an independent contractual relationship with Lloyd's that is unaffected by any rescission of Lloyd's obligations to NASL.

Appendix

A.

There is no established federal admiralty rule that governs the construction of maritime insurance contracts. See Commercial Union Ins. Co. v. Flagship Marine Services, Inc., 190 F.3d 26, 30 (2d Cir. 1999). Federal courts apply state law when there is no admiralty rule on point. See Wilburn, 348 U.S. at 314-16; Youell, 48 F.3d at 110. As the Second Circuit Court of Appeals has noted: "[m]arine insurance contracts are governed by federal admiralty law when there is an established federal rule, and by state law when there is not." Ingersoll Milling Machine Co. v. M/V Bodena, 829 F.2d 293, 305 (2d Cir. 1987).

When a federal court sitting in admiralty jurisdiction applies state law, it uses federal choice of law rules to determine which forum's law to apply. See Sundance Cruises Corp., 7 F.3d at 1080; State Trading Corp. of India v. Assuranceforeningen Skuld, 921 F.2d 409, 414 (2d Cir. 1990); Royal Ins. Co. of America v. Sportswear Group, LLC, 85 F. Supp.2d 275, 278 (S.D.N.Y. 2000). Generally, the court determines which state's law to use by "ascertaining and valuing points of contact between the transaction [giving rise to the cause of action] and the states or governments whose competing laws are involved." Advani, 140 F.3d at 162 (quoting Lauritzen v. Larsen, 345 U.S. 571, 582 (1953)); see also State Trading Corp. of India, 921 F.2d at 417. The Court of Appeals for the Second Circuit has instructed that "this choice-of-law analysis should include an assessment of the following contacts: (1) any choice-of-law provision contained in the contract; (2) the place where the contract was negotiated, issued, and signed; (3) the place of

performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties." Advani, 140 F.3d at 162; accord Royal Ins. Co., 85 F. Supp.2d at 278.

With respect to the first factor, the presence of a choice of law provision, the Complaint asserts that the policies specify New York law applies and the defendants do not dispute this. (Compl. ¶13, 19, 26; Notice of Motion to Dismiss Complaint, Ex. B.) The second factor, place of contracting, is unclear from the Complaint. The third factor, place of performance, is also unclear although Lloyd's agreed that if it failed to pay under the policies, any claimants under the policies could sue in any court in the United States and a New York law firm was authorized to accept service for Lloyd's. (Notice of Motion to Dismiss Complaint, Ex. B at LU000115.) The fourth factor, location of subject matter, is indeterminate because the subject of the contract is marine cargo that travels throughout the world. The fifth factor, place of incorporation and place of business of the parties, varies. The Complaint alleges that the Lloyd's Underwriters are citizens of the United Kingdom and a variety of other jurisdictions. (Compl. ¶6.) NASL is a New York corporation with its principal place of business in New York. (Compl. ¶7.) Joy-Lud is a New York corporation with its principal place of business in New York. (Compl. ¶9.) The other financiers are citizens of Ireland, Austria, and New England. (Compl. ¶¶8, 10, 11.) The plaintiff asserts without contradiction that all parties conduct business in New York. (Compl. ¶13.)

There is a presumption that "when a maritime contract contains a choice-of-law clause, the law chosen by the parties governs. . . ." Farrell Lines Inc. v. Columbus Cello-Poly Corp., 32 F. Supp.2d 118, 127 (S.D.N.Y. 1997). For admiralty cases, the Supreme Court has noted that "[e]xcept as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply." Lauritzen, 345 U.S. at 588-89. The exception is if "(1) that jurisdiction has no substantial relationship to the parties or the transaction or (2) that jurisdiction's law conflicts with the fundamental purposes of maritime law. . . ." Farrell Lines, 32 F. Supp.2d at 127 (quoting Perzy v. Intercargo Corp., 827 F. Supp. 1365, 1370 (D. Ill. 1993)). While England has significant contacts to this case, New York also has a substantial relationship to the parties and transaction at issue. Two of the parties are from New York, all parties conduct business in New York, and Lloyd's has agreed to accept service of process in New York. All parties have agreed to the application of New York law, and New York law, which follows federal maritime law, cannot be said to conflict with the fundamental purposes of maritime law. Thus, for issues in this case where there is no federal admiralty rule on point, New York law governs.

B.

The plaintiff argues that if this Court finds the policies are void because NASL violated its duty of utmost good faith, it has no obligation to the Financiers. The plaintiff argues that the Endorsement provisions assume that the policy has been validly formed and that if NASL violated its duty and there is no policy to begin with, the Endorsement provisions are

meaningless. The Financiers counter that the Endorsements are additional agreements that exist independent of the initial policy and protect the Financiers from recission due to misrepresentations by NASL.

As with other contracts, courts should interpret insurance policies to give effect to the intent of the parties as expressed in the clear language of the contract. See Andy Warhol Found. for the Visual Arts, Inc. v. Federal Ins. Co., 189 F.3d 208, 215 (2d Cir. 1999); Goldberger v. Paul Revere Life Ins. Co., 165 F.3d 180, 182 (2d Cir. 1999). Any ambiguities are to be read against the insurer. See Andy Warhol Found. for the Visual Arts, Inc., 189 F.2d at 215; Goldberger, 165 F.3d at 182; Reed v. Federal Ins. Co., 523 N.E.2d 480, 483 (N.Y. 1988). It is clear from the language of the Endorsements that they are separate contracts and shield the Financiers from the wrongdoing of the insured. The Endorsements expressly state that they are "agreements" and refer to themselves as distinct from the underlying policies: "[t]his agreement shall not extend the said policy to cover any additional risks." (Notice of Motion to Dismiss Complaint, Ex. B at LU000110.) Furthermore, the Endorsements specifically provide: "[t]his insurance, as to the interest of the financier shall not be impaired nor invalidated by any act or neglect of the named insured nor by failure to comply with any warranty or condition over which the Financier has no control. . . ." There is no textual support for the plaintiff's argument that this provision assumes a valid policy was formed. The plaintiff has also not alleged that the Financiers knew of or had any control over any misrepresentations NASL might have made to Lloyd's.

This provision would be meaningless if it were construed as the plaintiff would read it. If the plaintiff could void the Financiers' Endorsements and refuse to pay them because NASL allegedly breached its obligation to Lloyd's, the explicit protection for the Financiers against such an event would be completely without effect. Provisions in contracts should not be read in such a way as to make them meaningless. See, e.g., Mazaferro v. RLI Ins. Co., 50 F.3d 137, 140 (2d Cir. 1995); Jefferson Ins. Co. v. Travelers Indemnity Co., 703 N.E.2d 1221, 1225 (N.Y. 1998).

The situation of the Financiers in this case is similar to the situation of innocent mortgagees under New York law where the mortgagees are named insureds under an insurance policy obtained by the mortgagor. In New York, it is well established that if a mortgagee is explicitly covered in the mortgagor's insurance policy, the mortgagee has an independent contract with the insurer. See United States v. Commercial Union Ins. Co., 821 F.2d 164, 166 (2d Cir. 1987) (citing cases from New York and various other jurisdictions); Reed, 523 N.E.2d at 484; Syracuse Savings Bank v. Yorkshire Ins. Co., 94 N.E.2d 73, 75-77 (N.Y. 1950); Rubenstein v. Cosmopolitan Mut. Ins. Co., 403 N.Y.S.2d 96, 98 (App. Div. 1978); Citibank v. Covenant Ins. Co., 567 N.Y.S.2d 983, 986 (Sup. Ct. 1991). Even if the mortgagor's policy is later found to be void, the insurer's obligation to the mortgagee is not affected. See, e.g., Goldstein v. National Liberty Ins. Co., 175 N.E. 359, 360-61 (N.Y. 1931) (holding that policy that was void ab initio as to owner is still valid as to mortgagee under standard mortgagee clause); Vega v. North River Ins. Co., 410 N.Y.S.2d 813, 813 (App. Div. 1978) ("The mortgagee clause in the policy clause created

an independent contract between the insurer and mortgagee, which is not subject to defenses defendant-respondent may have against plaintiff owner.") (citations omitted); Rosen v. Colonial Coop. Ins. Co., 274 N.Y.S.2d 67, 70 (Sup. Ct. 1966) ("A standard policy of fire insurance may be void as to the owner because of his breach, yet, under the standard mortgagee clause be valid as to the mortgagee."). The standard mortgagee clause is similar to the Endorsements at issue in this case, usually providing "this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property. . . ." Rosen, 274 N.Y.S.2d at 70. The mortgagee clause and the Financiers' Endorsements are no different. In the absence of any allegations of wrongdoing by the Financiers, the conduct of NASL does not affect their Endorsements.

The plaintiff's reliance on First Fin. Ins. Co. v. Allstate Interior Demolition Corp., 14 F. Supp.2d 302 (S.D.N.Y. 1998) for the proposition that under New York law recission of the initial insurance policy terminates the rights of additional insureds is unpersuasive. That decision was overruled by the Second Circuit Court of Appeals because it was a sua sponte summary judgment without notice to the parties. See First Fin. Ins. Co. v. Allstate Interior Demolition Corp., 193 F.3d 109 (2d Cir. 1999). Moreover, First Financial did not address the New York cases dealing with the rights of innocent additional insureds. The only New York case cited held only that a party in default may not prevent a recission through subsequent acts remedying the breach. First Fin. Ins. Co., 14 F. Supp.2d at 307 (citing Callanan v. Powers, 92 N.E. 747 (N.Y. 1910)).

The plaintiff attempts to analogize this case to one in which an innocent director is denied the benefits of a directors and officers ("D &O") liability policy because the corporation that obtained the policy had submitted materially false information to the insurance company. See American Inter. Specialty Lines Ins. Co. v. Towers Fin. Corp., No. 94 Civ. 2727, 1997 WL 906427 (S.D.N.Y. Sept. 12, 1997) The analogy fails, however, because the plaintiff does not point to cases in which there was a separate agreement with the innocent director. Indeed, in the American Inter. Specialty Lines Ins. Co. case relied on by the plaintiff, the Court was quite clear that the result would have been coverage for the innocent director had the contract contained a proper severability provision: "The case law makes clear that [the innocent director] could have protected himself by requiring the policy to include a severability clause, so that a misrepresentation by [the corporate wrongdoer] would result only in recission of the D & O insurance policy as to [the corporate wrongdoer]." Id. at *10. In this case, the Financiers did protect themselves by obtaining an explicit provision stating that their insurance would not be impaired or invalidated by any act or neglect of NASL or any failure to comply with any warranty or condition over which the Financiers had no control.

Finally, the plaintiff's assertion that the Financiers are not protected from recission unless there is an additional clause in the agreement stating that concealment by the original insured is not imputable to the additional insured is incorrect. The case that the plaintiff cites, In re Payroll Express Corp., 186 F.3d 196, 209 (2d Cir. 1999), holds only that a specific clause is needed to protect the insured from recission of his policy because of misrepresentations by the insured's agent.

In this case, it is not alleged that NASL was the agent for the Financiers. Rather, they had independent endorsements that specifically protected them against the possibility of wrongdoing by NASL.

Because under New York law the Financiers Endorsements are independent contracts with Lloyd's that would not be affected even if NASL's contract with Lloyd's is void, the motion to dismiss is granted with respect to all counts for the defendants F.J. Elsner, Bowman, and Joy-Lud.[3] No wrongdoing by any of the Financiers has been alleged. It is not possible on the present papers, however, to decide that the plaintiff could prove no wrongdoing by the Financiers. Therefore, the dismissal of the claim against the Financiers is without prejudice.

V.

The defendants contend that the Complaint does not meet the requirements of Fed. R. Civ. P. 10(b), which provides: "Each claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count . . . whenever a separation facilitates the clear presentation of the matters set forth." The plaintiff has met this requirement by alleging two separate claims in two separate causes of

3. The result would be the same even if the law of England, the only other jurisdiction with an arguable interest in this case, were applied. See Transamerica Leasing, Inc. v. Institute of London Underwriters, 7 F. Supp.2d 1340, 1346 (D. Fla. 1998) (applying English law and concluding that an innocent co-insured's interest in a marine insurance policy was severable and the policy could only be voided under the doctrine of utmost good faith as to the non-disclosing party.).

action, each of which presents a clear claim for recission of the policies. Moreover, the failure to comply with Fed. R. Civ. P. 10(b) would not be a basis to dismiss the Complaint. See Bartholet v. Reishauer A.G., 953 F.2d 1073, 1078 (7th Cir. 1992) ("Although it is common to draft complaints with multiple counts . . . nothing in the Rules of Civil Procedure requires this."); Lahey v. JM Mortgage Serv., Inc., No. 99 Civ. 4074, 2000 WL 420851, at *2 n.3 (D. Ill. April 18, 2000); Stull v. Greene, No. 69 Civ. 440, 1971 WL 259, at *6 (S.D.N.Y. April 20, 1971).

VI.

Finally, the defendants argue that certain facts should be stricken from the Complaint under Fed. R. Civ. P. 12(f), which permits a court to strike "redundant, immaterial, impertinent, or scandalous matter." Specifically, they maintain that paragraphs 3, 27, 28, and 29 are irrelevant and prejudicial and should be stricken from the Complaint.

Motions to strike are disfavored and will not be granted "unless it is clear that the allegations in question can have no possible bearing on the subject matter." See Forschner Group, Inc. v. B-line A.G., 943 F. Supp. 287, 291 (S.D.N.Y. 1996) (internal quotation omitted). The Federal Rules of Civil Procedure evidence a strong preference that parties have an opportunity to develop their arguments. See SEC v. Lorin, 869 F. Supp. 1117, 1120 (S.D.N.Y. 1994). Thus, "ordinarily neither a district court nor an appellate court should strike a portion of the complaint on the grounds that the material could not possibly be relevant on the sterile field of the pleadings alone." Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893 (2d Cir. 1976).

There is no basis to conclude that the facts in the disputed paragraphs cannot be relevant. The alleged facts deal with the claim of the Financiers that prompted the plaintiff's investigation into NASL. As such, they provide background context for the events at issue in this case and should not be stricken. See, e.g., Forschner Group, Inc., 943 F. Supp. at 292 (denying motion to strike background information).[4]

Conclusion

For the reasons explained above:

1. NASL's motion to dismiss is denied in its entirety.

2. The motion by F.J. Elsner, Bowman, and Jay-Lud to dismiss is granted and the plaintiff's claims are dismissed without prejudice to repleading with respect to those defendants.

3. The plaintiff should serve and file any Second Amended Complaint consistent with this Opinion within twenty-one (21) days of the receipt of this Opinion. Any named defendants should move or answer within twenty-one (21) days of the receipt of the Second Amended Complaint.[5]

So Ordered.

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4. In its motion, NASL asked for a stay of discovery during the pendency of this motion. The motion is now denied as moot.

5. The Court has considered all of the arguments raised by the parties. To the extent not expressly dealt with in this opinion, the arguments are either without merit or moot.